The Legal Foundations of American Philanthropy 1776-1844

HOWARD S. MILLER

The State Historical Society of Wisconsin
Madison 1961

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Peter Dobkin Hall

Richard Magat

Editors

Introduction to the Philanthropy Classics Access Project Edition

At the time of its publication in 1961, historian Howard S. Miller's short monograph on the evolving law of American philanthropy attracted little notice. It was mentioned in the book notes feature of the *Mississippi Valley Historical Review* (now the *Journal of American History*) and ignored by all other scholarly publications, including the legal journals. Even *Foundation News*, published by the Foundation Library Center, whose editor, F. Emerson Andrews, had initiated the scholarly effort to systematically study philanthropy, failed to mention it -- although it took notice of many other publications on the history of philanthropy.

This is, in some respects, not surprising: Miller was still a graduate student at the University of Wisconsin. (His dissertation would not be completed for another three years.)[1] Still, given the fact that Miller's was the first book length historical study of American charities law to be published since the appearance of Carl Zollmann's *American Law of Charities* in 1922, one would think that it would have attracted some critical attention among historians and legal scholars.[2]

There was, in fact, burgeoning interest in American philanthropy at the time *Legal Foundations* appeared. Five years earlier, the Princeton Conference on the History of Philanthropy had convened leading scholars to address the "sad shortage of historical research on philanthropy."[3] The conference was conceived by F. Emerson Andrews, the Russell Sage Foundation executive who had been writing on foundations and philanthropy since the late 1930s and who later became the first director of the Foundation Center, compiler of the first edition of the Foundation Directory (1960), and first editor of *Foundation News*.[4] He

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[1] Howard S. Miller, *Dollars for Research: Science and Its Patrons in Nineteenth-Century America* (Seattle, WA: University of Washington Press, 1970). Its title as a dissertation was "A Bounty for Research: The Philanthropic Support of Scientific Investigation in America, 1838-1902" (Madison, WI: Unpublished doctoral dissertation, University of Wisconsin).

[2] Carl Zollmann, *American Law of Charities* (Milwaukee, WI: Bruce Publishing Company, 1924). In 1959, The *Mississippi Valley Historical Review* (now the *Journal of American History*) had published an important piece, Irvin G. Wyllie's "The Search for an American Law of Charities, 1776-1844," *Mississippi Valley Historical Review*, 46, 203-221 (September 1959). Wyllie was a University of Wisconsin colleague of Curti's. Curiously, the task of writing the book on the subject was assigned to graduate student Miller rather than to a senior professor.

[3] This reference to the sad shortage of research on philanthropy is the first iteration of what would become an almost continuous refrain over the next half-century.

[4] Andrews's writings on philanthropy include *American Foundations for Social Welfare* (New York,, NY: Russell Sage Foundation, 1946), *Russell Sage Foundation, 1907-1946* (New York, NY: Russell Sage Foundation, 1947), studies of *Philanthropic Giving* (New York, NY: Russell Sage Foundation,1950), *Corporation Giving* (New York, NY: Russell Sage Foundation, 1952), *Attitudes towards Giving* (New York, NY: Russell Sage Foundation, 1953), *Philanthropic Foundations* (New York, NY: Russell Sage Foundation, 1956), *Legal Instruments of Foundations* (New York, NY: Russell Sage Foundation, 1958), Foundations: 20 viewpoints (New York, NY: Russell Sage Foundation, 1965), Patman and the Foundations (New York, NY: Russell Sage Foundation, 1968). His autobiography, *Foundation Watcher* (New York, NY: Russell Sage Foundation, 1973), is one of the most valuable primary sources on the politics of knowledge about philanthropy at mid-century.

recruited Pulitzer prize-winning University of Wisconsin intellectual historian Merle Curti to organize the conference. Curti invited eight colleagues: University of Pennsylvania economic historian Thomas Cochran, Cornell historian of science Henry Guerlac, University of Washington historiographer W. Stull Holt, Yale Divinity School religion historian Kenneth Latourette, Columbia diplomatic historian and historiographer Richard B. Morris, Johns Hopkins medical historian Richard Shryock, and Columbia political scientist David B. Truman.

The Princeton Conference -- and the funds that the Ford Foundation made available to Curti and other scholars -- produced an wave of seminal studies, including Curti's own *American Philanthropy Abroad* (1963) and (with Roderick Nash) *Philanthropy in the Shaping of Higher Education* (1965); his colleague Irvin Wyllie's important article on the legal history of philanthropy; and dissertations and monographs by their students, including Howard S. Miller, John Lankford, James Howell Smith, and Victor Thiessen.[5] It also supported a seminar on philanthropy and the law at the University of Wisconsin taught by Wyllie.[6] Ford funding also supported work at Harvard by Professor Winthrop K. Jordan, who wrote five important studies of British philanthropy; David Edward Owen; and graduate students Daniel M. Fox and Neil Harris, who wrote important studies of museums and the arts in America, and Helen Lefkowitz Horowitz, whose 1969 dissertation on cultural philanthropy was only the first of her many contributions to the literature on American institutional life.[7] Funding catalyzed by the Princeton Conference led

[5] Merle Curti, *American Philanthropy Abroad* (New Brunswick, NJ: Rutgers University Press. 1963); Merle Curti & Roderick Nash. *Philanthropy in the Shaping of Higher Education* (New Brunswick, NJ: Rutgers University Press, 1965); Wyllie, *op. cit.*; Miller, *op cit.*; Lankford, J. E. "Protestant Stewardship and Benevolence, 1900-1941: A Study in Religious Philanthropy," unpublished dissertation, (Madison: University of Wisconsin, Department of History, 1962); James Howell Smith, "Honorable Beggars: The Middlemen of American Philanthropy, unpublished dissertation (Madison, WI: University of Wisconsin, Department of History, 1968); Victor Thiessen, "Who Gives a Damn? A Study of Charitable Contributions," unpublished doctoral dissertation (Madison, WI: University of Wisconsin, Department of Sociology, 1968);

[6] Frances Huehl's d informative issertation, "Merle Curti: Remembering a Teaching Life" (School of Education, Indiana University, 2001), provides an interest account of Curti's activities as a scholar and principal investigator of the $100,000 Ford Foundation grant to the University of Wisconsin-Madison to support work on philanthropy. Huehls suggest that Curti found his experience with foundation-subsidized research disillusioning: "Curti's recollections of the project during his 1982 oralhistory were perfunctory, lending the impression that his memories of the project were not as warm as they might have been" (119). He believed "that the project was too narrow in scope to have much impact" on the field of history. He found it difficult to find scholars willing to participate in the project and foundations unwilling to provide researchers with access to their archives. The Ford grant produced fifteen published articles, seven master's essays, five dissertations, and Wyllie's symposium on philanthropy and law.

[7] Wilbur K. Jordan's books included *Philanthropy in England, 1480-1660* (New York: Russell Sage Foundation, 1959); *The Charities of London, 1480-1660* (New York: Russell Sage Foundation, 1960); *The Forming of the Charitable Institutions of the West of England: A Study of the Changing patterns of Social Aspirations on Bristol and Somerset, 1480-1660* (Philadelphia, PA: American Philosophical Society. 1960); *The Charities of Rural England, 1480-1660* (New York: Russell Sage Foundation, 1962); *The Social Institutions of Lancashire: A Study of the Changing Patterns of Aspirations in Lancashire, 1480-1660* (Manchester, UK: Chetham Society, 1962). Owen's worked included *English*

to the publication of a number of pioneering monographs by scholars at other institutions, including University of Georgia communications scholar Scott M. Cutlip's *Fund Raising in the United States*, Clifford Griffin's study of stewardship, and Robert M. Bremner's *American Philanthropy*.[8]

Philanthropy 1660-1960 (Cambridge, MA: Harvard University Press, 1965) and *The Government of Victorian London, 1855-1889: The Metropolitan Board of Works, the Vestries, and the City Corporation* (Cambridge, MA: Harvard University Press. 1982). Other works supported by funds mobilized by the Princeton Conference included Daniel M. Fox, *Engines of Culture: Philanthropy and Art Museums* (Madison, WI: Historical Society of Wisconsin,1963); Neil Harris, *The Artist in American society: The Formative Years*. (New York, NY: George Braziller. 1966); Helen Lefkowitz Horowitz, *Culture and the City: Cultural Philanthropy in Chicago, 1890-1917* (Cambridge, MA: Harvard University. 1969).

[8] Scott M. Cutlip, *Fund Raising in the United States: Its Role in America's Philanthropy* (New Brunswick, NJ: Rutgers University Press, 1965); Clifford S. Griffin, *Their Brothers' Keepers: Moral Stewardship in the United States, 1800-1865* (New Brunswick, NJ: Rutgers University Press. 1960); Robert M. Bremner, *American Philanthropy* (Chicago, IL: University of Chicago Press, 1960). Other important studies published between 1956 and 1970 did not receive support through Princeton Conference-generated funds, but they may have benefited from the synergistic effects of these grants. These include Morrell Heald's invaluable 1969 study of the evolution of corporate social responsibility, *The Social Responsibilities of Business: Corporation and Community, 1900-1960* (Cleveland, OH: The Press of Case Western University, 1969), John R. Seeley's study, *Community Chest: A Case Study in Philanthropy* (Toronto, Canada: University of Toronto Press. 1957); and Nathan Huggins's important study of late 19th-century Boston charities, *Protestants against Poverty: Boston's Charities, 1870-1900* (Westport, CT: Greenwood Press, 1971).

In addition to supporting graduate students and postdoctoral fellows, creating publishing opportunities, and building network capacity, the Princeton Conference helped to establish important scholarly resources, like the remarkable collection of materials at the Historical Society of Wisconsin (which include the philanthropic advisory files of New York's Hanover Bank and the papers of key corporate philanthropy figure Arthur W. Page).

In this context, it is important to appreciate Miller's little monograph as the first in the series of book-length publications that would result from the Princeton Conference.

Legal Foundations in Retrospect

Although a remarkable piece of work for its time -- and still valuable as an overview of the evolution of American charities law in the ante bellum period --, *Legal Foundations* suffers serious shortcomings. To begin with, it is too much a product of its times, overemphasizing the status of charities under federal law, failing to grasp the fact that charities law is fundamentally a state, and ignoring the debate and litigation within the states over questions settled under federal law which not only continued for decades after 1844, but also, depending on outcomes, determined where charity flourished and where it languished. Miller's excessive concern with federal issues was both the product of his own evident misunderstanding of the nature of the federal system and, we can reasonably assume, of his sponsors' desire for scholarship supporting their own contentions about the historic legitimacy of private charity.

To fully grasp why his sponsors wanted scholarship of this kind, we need to appreciate the extent to which organized philanthropy felt threatened during the 1950s. In the decades between the establishment of the Rockefeller Foundation in 1913 and the end of the second World War, Congress had largely ignored foundations and other private charities.[9]

Congress had conducted several major investigations of "foundations and other tax-exempt entities" in the early 1950s.[10] While philanthropy's lobbyists had succeeded in preventing the enactment of hostile legislation, the possibility of future episodes of regulatory enthusiasm was very much on the minds of Andrews and the other foundation leaders who underwrote the scholarly initiatives coming out of the Princeton Conference. In 1961, the Senate Finance Committee issued a minority report warning that the continuing proliferation of foundations threatened to erode the tax base and to further concentrate economic power. "At present rates of establishment," the senators warned, "substantial control of our economy may soon rest in the 'dead hands' of such organizations."[11] In the same year, Texas Congressman Wright Patman launched what would be a decade long attack on foundations. In this hostile climate, Emerson Andrews and other friends of philanthropy believed that making the case for philanthropy a fundamental and deeply-rooted aspect of American institutional life -- rather than a creation of tax and estate lawyers seeking to reduce their clients' tax burdens -- would help to mollify Congress and an increasingly tax sensitive public.[12]

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[9] John D. Rockefeller's efforts to secure a congressional charter for the Rockefeller Foundation sparked major controversy and debate. When it became clear that a charter would not be enacted, Rockefeller took his proposal to the New York legislature. In 1915-1916, a congressional commission, chaired by Senator Frank Walsh of Montana, launched a broad inquiry into "industrial relations" which included inquiry into the economic and political power of foundations and featured testimony by Rockefeller and Andrew Carnegie. The commission's critical report was overshadowed by the first World War need to bring business and government into partnership.

[10] U.S. House of Representatives. Committee on Ways and Means. 1948. *Revenue Revisions, 1947-48. Hearings before the Committee on Ways and Means. Tax Exempt Organizations Other than Cooperatives.* 80th Congress, First Session. Washington, DC: Printed for the Use of the Committee on Ways and Means.; U.S. House of Representatives. 1953a. *Final Report of the Select Committee to Investigate Foundations and Other Organizations.* 82nd Congress, Second Session. Washington, DC: Government Printing Office; U.S. House of Representatives. 1953b. *Hearings before the Select Committee to Investigate Tax-Exempt Foundations.* 82nd Congress, Second Session. Washington, DC: Government Printing Office; U.S. House of Representatives. 1954. *Hearings before the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations.* Washington, DC: Government Printing Office.

[11] U.S. Senate, *Limitation on Deduction in Case of Contributions by Individuals for Benefit of Churches, Educational Organizations, and Hospitals--A Report together with Minority and Supplemental Views*," 87th Congress, 1st Session, Report No. 585 (July 20, 1961). Among those signing the minority report were Senators Russell Long, Albert Gore, and Eugene McCarthy.

[12] In fact, much of the animus directed at foundations was generated by such things as the estate-planning scheme that enabled the descendants of automobile manufacturer Henry Ford to inherit the company without paying a penny in estate tax. The company, which had been privately held, was converted into a joint stock company. Two classes of stock were created: one class, which carried with it voting power, went entirely to Ford's heirs; the second class, which paid dividends but had no voting power, was given to the Ford Foundation -- which in turn sold it to investors. The proceeds of this

Under the circumstances, it is hardly surprising that the major focus of the study is the struggle in American law between restrictiveness and liberality. Miller portrays colonial legal traditions, largely inherited from England, which were generally permissive as regards the rights of donors, testators, and charitable institutions. After 1789, charities law became more restrictive as states under the sway of Jeffersonianism sought to limit or abolish the special privileges of churches and corporations. Inevitably, these efforts led to litigation in state and federal courts. Because of the dominance of Jeffersonian doctrines, the outcomes of these cases tended to favor restrictions on charities.

There were, of course, exceptions. When New Hampshire Jeffersonians tried to take over privately chartered Dartmouth College, the United States Supreme Court issued a epochal majority opinion which extended the protection of the Constitution's contracts clause to corporations -- a decision with far reaching effects on all corporations, for-profit and nonprofit. In the same term, however, the court also adjudicated a case involving the right of a Virginia testator, one Silas Hart, to make a charitable bequest to a corporation not yet in being in the Commonwealth of Pennsylvania.

In Pennsylvania, which had annulled the Elizabethan Statute of Charitable Uses, such a gift was illegal. The court ruled for Virginia -- and in doing so effectively made charity hostage to state legislatures. In the New England states, which had not annulled the common law, charities flourished. Almost everywhere else, they languished under the baleful gaze of hostile and suspicious legislators and jurists.[13]

Reversing this restrictive trend was the work of scholarly jurists like federal court judge Henry Baldwin. His demonstration that the Elizabethan statute was not the legal basis for the existence of charities under the common law and that charities had long pre-existed the 1601 statute enabled the U.S. Supreme Court in 1844 Girard Will to reverse its 1819 ruling in the Hart case, placing the legal status of charities under federal law on a firm and liberal doctrinal foundation.

In making the case for unrestrictive charities laws, Miller obviously served the purposes of contemporary philanthropy's public agenda. But in doing so, he seriously distorted and oversimplified the historical record. As Carl Zollmann's extraordinary *American Law of Charities* shows, the liberality of the Supreme Court's

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sale made the Ford Foundation the largest grant maker in the world. On the Ford Foundation, see Dwight MacDonald, *The Ford Foundation: The Men and the Millions -- An Unauthorized Biography* (New York, NY: Reynal& Company, 1956).

[13] New York restricted not only the right of testators and donors to give to charities, but limited the amount of property a charity could hold. In addition, New York charities were regulated by a powerful regulatory body, the Regents of the University of the State of New York. On this, see John S. Whitehead , *The Separation of College and State* (New Haven, CT: Yale University Press, 1976). In Ohio, most eleemosynary corporations were chartered only on condition that the state be permitted to appoint members of their governing boards. In Virginia, the state's Attorney General warned permissiveness towards charities could led to "the whole property of society to be swallowed in the insatiable gulph of public charities" (Gallego's Executors v. Attorney General, 1832).

Girard decision was hardly representative of the situation in the states, where, outside of New England, restrictiveness remained the rule until well into the twentieth century. (It remained illegal to establish a charitable trust in Misssissippi until after the second World War!).

Part of the problem in *Legal Foundations* was the fact that neither Miller nor his mentor, Irvin G. Wyllie, were trained in the law. As a result, they failed to appreciate some of the fundamental peculiarities of American charities law, particularly the problematic blending of the trust and the corporation characteristic of our eleemosynary institutions. Nor did they fully grasp the relation between federal and state law. Typical of post-New Deal scholarship, they blithely assumed that federal law trumped the decisions and enactments of state courts and legislatures. So, as they understood the evolution of American legal system, all that counted was the status of charities under federal law.

That said, Miller's book has remarkable strengths. His portrayal of the unsettled condition of charities law before 1820 and his identification of the partisan character of conflict over the legal status of charities is genuinely original and valuable work. He makes it quite clear that neither the Founding Fathers nor their successors were comfortable with the idea of private charities, especially when they possessed unlimited power to accumulate property. The attention he lavishes on state-level development in the Early National Period makes his failure to attend to the continuing importance of the states after 1844 all the more curious.

It seems likely that Miller's portrayal of charities law, both on the state and federal levels, as a work-in-progress and as the product of fierce partisan clashes that disturbed his institutional sponsors. They had no doubt hoped that the scholarly initiatives sparked by the Princeton Conference would help legitimate philanthropy by highlighting both the long history of private charity in America and its association with disinterested efforts to serve the common good. In calling attention to the role of partisan and class interests in shaping charities law, Miller's book fell short of their expectations.

Since the conservative revolution, the kind of legal realist perspective Miller brought to his account of the development of charities law has become less controversial. Two and a half decades of fierce partisan warfare over the fundamentals of social policy have rendered the central tenet of legal realism -- that all law is made by human beings and, thus, is subject to human foibles, frailties and imperfections -- seems less heretical than it did in the 1960s, when the northeastern Protestant establishment's foundations, private universities, and other bastions of institutional liberalism, still stood firm.

Author Biography

Peter Dobkin Hall is Hauser Lecturer on Nonprofit Organizations at Harvard's Kennedy School of Government. For many years he was associated with Yale's Program on Non-Profit Organizations. His publications include *The Organization of American Culture, 1700-1900: Private Institutions, Elites, and the Origins of American Nationality* (1982), (with George E. Marcus) *Lives in Trust: The Fortunes of Dynastic Families in Late Twentieth Century America* (1992), and *Inventing the Nonprofit Sector: Essays on Philanthropy, Voluntarism, and Nonprofit Organizations* (1992). He is co-editor of *Sacred Companies: Organizational Aspects of Religion and Religious Aspects of Organizations* (1998) and (with Colin B. Burke) the chapter on nonprofit, voluntary, & religious entities in *Historical Statistics of the United States -- Millennial Edition* (2006).

Library of Congress Catalog Card Number: 61-62507

Composed by Graphco, Inc., Neenah, Wisconsin
Printed by Cushing-Malloy, Inc., Ann Arbor, Michigan

TO

C. A. B.

Contents

Preface

THE LAW OF CHARITABLE TRUSTS WAS A CREATION OF ANGLO-American jurisprudence.[1] Legal trusteeship as a means of administering philanthropic gifts developed in fifteenth-century England, where for many years substantial tracts of land had been falling under the control of monasteries and other religious houses as a result of charitable bequests. English feudal lords, fearing that the Church would soon rival their political power, enacted mortmain statutes which severely limited such devises.[2] Almost immediately, however, a new form of endowment developed, designed to circumvent the restrictive mortmain acts. Rather than bequeathing property directly to a religious organization, benevolent testators began to convey their gifts to an individual *in trust* for the use of the designated religious body.[3]

The trust owed its peculiar character to the fact that England had separate courts of law and equity. Because ordinary courts of law refused to enforce charitable trusts, the Chancellor assumed the responsibility of enforcing duties upon trustees under his equity powers. Chancery courts balanced legal title against equitable rights, giving beneficiaries an interest in property donated for

their use, and protecting them in the enjoyment of that interest.[4] As Chancery emerged as an established court of the Realm, charitable trusts became more secure. Eventually the trust became the major instrument for founding and supporting secular as well as religious charities.

Until 1601 the English law of charity was a vast, cumbersome patchwork. In that year the great Elizabethan Statute of Charitable Uses simplified the system and reduced it to an orderly form. The preamble explained that the statute aimed at correcting abuses, then enumerated a list of twenty-one acceptable philanthropic objects. The sovereign and "sondrie other well disposed persons" had for some time made donations for such varied uses as poor relief, education, the care of disabled soldiers, the repair of bridges, roads, and other public works, the maintenance of prisons, "for Mariages of poore maides," and for "Supportacon Ayde and Helpe of younge Tradesmen, Handiecraftesmen and persons decayed. . . ."[5] The statute formalized previous practice by ordering the Chancellor to investigate the misuse of charitable gifts, to gather evidence and appoint juries, and to hand down decisions in equity. As originally listed, the uses recognized by the statute covered a broad spectrum of social responsibility; under subsequent judicial interpretation, they came to encompass almost any conceivable charitable scheme. The Statute of Elizabeth became the keystone of the English law of charity and provided the foundation for charity jurisprudence in the American colonies.

Partly because of the encouragement of English charity law and the impetus provided by the social teachings of the churches, philanthropy flourished in colonial America. Whatever their theological differences, the Massachusetts Bay Puritans, the Pennsylvania Quakers, and the Anglicans and Baptists of Virginia all shared the traditional Protestant emphasis upon the individual's responsibility for the spiritual and material welfare of the community, and accordingly supported a variety of charitable institutions.

As important as Old-World influences, however, were the pressing needs of colonial society itself. Because of the immediate need for schools, hospitals, churches, and relief agencies, the colonists

used all available means to create such institutions. They did not debate the question of public versus private responsibility, or waste their time on abstract discussions of preferred methods. In the work of establishing cherished social institutions on American soil, public and private philanthropy were so completely intertwined as to become almost indistinguishable. The law itself reflected a pragmatic approach to the solving of social problems through philanthropy. Colonial assemblies went out of their way to remove obstacles in the way of charities. The courts, valuing social betterment above legal technicalities, asserted a permissive charity doctrine that supported donors' benevolent intentions, even when the formulation of their plans was clearly imperfect.

The American Revolution and the rise of nationalistic sentiment profoundly affected the evolution of American law in general and the law of philanthropy in particular. Did the revolt against British rule require an abrupt break with English legal traditions as well? Popular antagonism against all things British, intensified by the War of 1812, seemed to demand a new legal system for the new nation. On the other hand, English law was admittedly the foundation of American legal thinking. American lawyers, however intense their patriotism, could not escape their legal past. They found it necessary to retain the framework of English jurisprudence, cleansed of what they considered to be its most undesirable elements. During the early years of the Republic, American lawyers and judges, acting in curiously contradictory ways, simultaneously relied upon and condemned English principles and precedents.

Did a permissive law of charity depend on the sanction of English laws, such as the Statute of Elizabeth, or upon colonial practice and the special needs of American society? Between the Revolution and 1844 policy-makers in Pennsylvania, New York, Maryland, and Virginia debated this question at some length. The debate reflected conflicts in state politics as well as the generally unsettled state of American jurisprudence. Judges and legislators in other states, while occasionally adding an original thread to the legal fabric, usually followed the four leading states when confronted with questions in this field.

Until 1819 American states generally followed the permissive,

pragmatic principles of colonial practice. Then, in *The Philadelphia Baptist Association v. Hart's Executors,* a Virginia case that marked a turning point in charity law, the United States Supreme Court defeated a philanthropic bequest on the technical ground that the power to enforce charitable trusts depended on the Statute of Elizabeth, which was not then in effect in Virginia. The courts of Virginia and Maryland almost immediately adopted the restrictive principles of the Hart decision, and public policy in several other states turned in the same direction. This trend distressed lawyers like James Kent of New York, and Henry Baldwin and Horace Binney of Pennsylvania, who argued for a return to a permissive policy which placed public welfare above legal technicalities. In 1844 they won their point when the Supreme Court in the Girard Will case reversed the stand it had taken in the earlier Hart decision. Although the Girard ruling established a permissive public policy toward philanthropy as the dominant tradition in American jurisprudence, the restrictive "Virginia Doctrine" survived and continued to influence legislation and judicial decisions well into the twentieth century.

What lay behind the shift toward a restrictive charity policy? What convictions, sentiments, and prejudices shaped the law? The outlook represented by the Hart ruling was not so much the result of antagonism toward philanthropy itself as a by-product of criticism directed at institutions with which charities were associated. From the colonial period, many Americans equated philanthropy with religious charities, with the result that public policy toward charitable trusts became an expression of attitudes toward the role of churches in society. The Founding Fathers demanded a separation of church and state; their attitudes had been shaped in part by English experience with religious charities in the Middle Ages, when through death-bed donations the Church had acquired a controlling interest in society. In the early nineteenth century, judges sometimes thought they could detect the beginnings of the same undesirable tendency in American philanthropy. Consequently, they urged the passage of mortmain acts by state legislatures and through judicial decisions limited the amount of property charitable institutions could hold. Although directed initially at religious

charities, the charge that philanthropic societies withdrew excessive quantities of wealth from circulation came to be used against completely secular institutions as well. Other factors, such as the hostility of Jacksonian Democrats toward privileged banking corporations, helped intensify judges' and legislators' suspicions of charitable societies that sought to protect their interests by securing charters of incorporation.

American charity law has been an organic expression of American social life, conditioned by it, yet in turn conditioning it. Complex social forces, not syllogisms or rules of precedent, have determined its content and spirit. By defining the ways in which philanthropic individuals could convey their property, to whom, and for what purposes, the law of philanthropy has helped shape the character of American society.

My debts, for so small a book, are many. Professor Irvin G. Wyllie of the University of Wisconsin suggested and supervised the study and helped arrange its publication. Professor Maurice Leon of the University of Wisconsin law faculty introduced me to the mysteries of legal bibliography and patiently answered all the questions that only a novice would ask. Two historians of the law, Professors J. Willard Hurst of the University of Wisconsin and Neill H. Alford, Jr., of the University of Virginia, read the manuscript in its original form and offered many helpful suggestions for its improvement. I am also indebted to Professors William B. Hesseltine, Vernon Carstensen, and Merle Curti of the University of Wisconsin, whose criticisms led to improvements in style, content, and presentation. Any surviving errors of fact or interpretation are my own.

Any credit must be shared with the Ford Foundation, which made this study possible through its support of the History of Philanthropy project at the University of Wisconsin.

The University of Wisconsin
Fall, 1960

H. S. M.

The Legal Foundations of American Philanthropy 1776-1844

CHAPTER 1

A Tradition in Transit

AS THE BRIG *Arabella* NEARED THE COAST OF NEW ENGLAND in the spring of 1630, John Winthrop, the newly elected Governor of Massachusetts-Bay and leader of the Puritan migration, reminded his followers of their responsibilities to one another. The task of establishing a Godly Commonwealth in the forbidding American wilderness would demand an unusual degree of co-operation and community spirit. "We must be willing to abridge ourselves of our superfluities," Winthrop advised, "for the supply of others' necessities."[1] Because God had ordained a society in which "some must be rich, some poore, some highe and eminent in power and dignitie; others meane and in subjection," the spectre of poverty would always haunt the Puritans' "Citty upon a hill." Although it was the duty of the community to care for its less fortunate members, no amount of philanthropy could alter the fundamental distinctions between rich and poor, distinctions instituted by God to insure mutual dependence among men that "they might be all knitt more nearly together in the Bonds of brotherly affection."[2]

The hard conditions of colonial life reinforced the traditional Calvinist emphasis upon the social responsibilities of each member of the Godly Commonwealth. However much contemporary English philanthropy reflected attempts by far-sighted individuals to shape the future, the principal aim of philanthropy in the colonies was simply that of satisfying the immediate needs of a primitive society.[3] Every community desperately needed churches, schools, hospitals, and relief agencies of every sort, institutions which philanthropy could supply. Little wonder that the colonists encouraged and approved almost any plan of giving that promised some social benefit. Because their corporate view of society blurred distinctions between the public and the private, the colonists used both public and private charity without any thought of division or conflict between them. Their pragmatic approach conformed to the liberal traditions of English charity law and guaranteed a climate of legal and social opinion favorable to all types of philanthropy.[4]

Influenced by the traditional Protestant emphasis upon knowledge of the Scriptures, the New England Puritans supported education from the outset. A credit from the General Court, together with John Harvard's bequest, established Harvard College in 1636. Subsequent private gifts and public grants testified to the continuing generosity of the community as a whole. Second only to Harvard, the most promising philanthropic project in early New England was the Reverend John Eliot's attempt to educate and convert the Indians. The experiment prospered until the 1670's, when King Philip's War caused many New Englanders to doubt their ability to transform heathen hearts through charity.[5]

Meanwhile, both private agencies and the Massachusetts General Court provided for the colony's poor. Such organizations as the Scot's Charitable Society (1657) and the Charitable Irish Society (1737) supported many of their destitute countrymen. Between 1696 and 1719 the Scot's Charitable Society increased its operating capital fourfold, an indication of a rising level of charitable activity. In Massachusetts individuals occasionally left legacies for the purchase of town cows for the use of the poor. Others left funds for general relief. Between 1658 and 1660 alone, Boston citizens bequeathed a total of £235 for the care of the city's destitute.[6] At first Massachusetts followed the principles of the Elizabethan poor law, which provided that each locality must assume responsibility for caring for its own dependents through public funds. Accordingly, in 1692 the General Court provided that those unable to work should apply to their towns for support. The burden on the towns, however, proved too great. By the middle of the eighteenth century there was a well-defined class of "Province Poor," who received assistance directly from the General Court.[7] By 1776 Massachusetts had developed a complex system of poor relief involving both local and provincial governments. Private giving supplemented public relief and also provided essential support for educational, religious, and cultural activities. Massachusetts' liberal law of charity after the Revolution reflected the Bay Colony's colonial experience.

Largely because of Quaker influence, Pennsylvania encouraged philanthropy throughout the colonial period. Until 1705 the Society of Friends supplied all the needs of Philadelphia's poor. Seven years later, anticipating similar action by the city government, the Friends donated Philadelphia's first almshouse. This was a continuing story: thanks to Quaker generosity there was little need for public expenditures for charity before the middle of the eighteenth century.[8]

As in Massachusetts-Bay, social utility took precedence over fine distinctions in the law of Pennsylvania. To protect the valuable contributions made by Quaker societies and other unincorporated religious groups, the Pennsylvania assembly in June, 1712, passed a sweeping act guaranteeing the right of such societies to receive and hold gifts for churches, burying grounds, hospitals, schools, and almshouses.[9] Because the act included a clause confirming all *prior* gifts and devises, however, the Solicitor General in London insisted that the act was a piece of *ex post facto* legislation and advised the Queen to disallow it, which she did in February, 1713.[10]

The Pennsylvania assembly, however, was determined to give private philanthropy the full protection of the law. In May, 1715, the assembly once again enacted the same statute with only minor alterations in the text. When the act went to England for approval,

it carried with it a memorial explaining the basis of the legislation. "The true reason of this act," the memorial explained, "was to encourage in an infant colony, where there were no endowments, the building of hospitals, churches and other places for religious worship, and charity schools for the education of youth. . . ." The act guaranteed that gifts for pious and charitable purposes could not be diverted into other channels. Nor was the act in any way sectarian. The memorial declared that it was "the interest of persons of all persuasions that this law should pass without any view to this or that persuasion only."[11] But once more the Crown, arguing that the confirmation of previous gifts would "probably be attended with ill consequences," struck down the Pennsylvania statute.[12] Finally in February, 1731, almost twenty years after the initial attempt, the Pennsylvania assembly secured passage of a revised version of the original act confirming the legality of gifts for charitable purposes.[13]

Throughout the eighteenth century, Pennsylvania legislators continued to remove legal obstacles that stood in the way of public and private philanthropy. In 1749 the assembly incorporated the overseers of the poor in each county, and confirmed their right to receive and manage all gifts, devises, and bequests for the poor.[14] The act contained the first specific provision in Pennsylvania for voluntary contributions for public poor relief. It effectively combined public and private philanthropy and legalized the partial alleviation of public burdens through individual donations.[15]

Virginians, like the Massachusetts-Bay Puritans and the Pennsylvania Quakers, did their best to encourage private giving in the colonial period. Such giving was necessary because of the colony's large population of paupers and other dependents. Although the established Anglican Church, applying the income from its glebe lands through secular vestrymen, was the primary relief agency, individual donors supplemented the work of the church.[16] By the mid-seventeenth century a considerable number of colonists had made charitable bequests. In contrast to the demands of later Virginia jurists that wills be precisely phrased, especially in their charitable provisions, the colonial judges enforced such bequests as that of Captain John Moon, who in 1665 left four cows "to remain for a Stock forever for poor Fatherless Children that hath nothing left to bring them up, and for Old People past their labour or Lame people that are destitute in this lower parish of Isle of Wight County. . . ."[17]

Colonial Virginia courts went to some length to enforce charitable bequests. In theory, at least, the laws of England were the laws of Virginia, including the mortmain statute of 1736, which was designed to limit the secular power of the Anglican Church. By forbidding all conveyances of land for charitable purposes, unless they had been formally deeded in writing a full year before the donor's death, the statute cut off a considerable number of deathbed donations. However advisable or necessary this and other safeguards were in England, Virginia judges regarded them only as obstacles to much-needed philanthropy. Wealthy planters often left large tracts for the support of free schools, reported Robert Beverley in 1705, and although many of the legacies were administered by the local Anglican parishes, he doubted "that any of these Pious Uses have been Mis-apply'd."[18] In a case decided in March, 1743, Virginia judges openly attacked the mortmain act. Because the American colonies were not *specifically* mentioned in the statute of 1736, asserted the court, it was not binding on them: "The Devise of the Land in Virginia to a Charity is not Void by that act."[19]

There was, nonetheless, an inherent problem in colonial Virginia philanthropy, and it was one which had far-reaching consequences for the American law of charity. In the back country, dissenters, especially Baptists and Presbyterians, far outnumbered Anglican communicants. In western parishes the problem of poor relief was further complicated by deep-rooted antagonisms toward the established church. In 1776 the Virginia Association of Baptists protested that a general religious assessment, though intended in part for poor relief, was "pregnant with various Evils destructive to the Rights and Priveledges" of non-conforming religious societies.[20]

Church-administered poor relief came under fire as the demand for disestablishment gained momentum in the Revolutionary era. The political power of the church rested on its real estate holdings, and the same land supported its philanthropic activities. Those

who opposed an established religion feared that any donation to the church for charitable purposes would also increase its political power. The battle between church and state, conformist and dissenter, left bitter memories, and for a quarter of a century after the Revolution the spectre of a powerful established church still haunted Virginia policy-makers. No longer limiting their criticism to the Anglican Church, they attacked all religious societies by severely limiting their right to receive charitable donations and bequests.

CHAPTER 2

New Law for the New Nation

AS SOON AS THE AMERICAN COLONISTS DECLARED THEIR INDEpendence from England, they faced the pressing problem of formulating an appropriate legal system for the new nation. Could English legal precepts and institutions be made to conform to the needs of a more democratic society? How important should rules of precedent be in the new system? Should each state devise its own body of laws, or should there be a uniform federal code? These and other vexing questions forced a conscious reappraisal of American law during the first decades of national independence.[1] Against a background of social adjustment and experimentation the law of charity matured and accommodated itself to the needs of American society.

The initial decision in most states was to postpone final action regarding a legal system. The delegates to the Revolutionary assemblies and constitutional conventions saw the necessity of providing legal machinery for the duration of the Revolution, but they tried to leave the way clear for future revision. They were in the curious predicament of rebelling against the British Crown, and yet being forced by circumstances to continue operating under

British laws. A Vermont statute of 1797 explained the problem clearly. The inhabitants of the state had lived a long time under English law. When the revolution cut the state adrift, its "peculiar situation . . . as a new formed government" made it impossible to conjure up at once a new set of legal maxims and local precedents. English laws, if only by default, would remain on the books. Like the other new American states, however, Vermont hastened to add that this was only a temporary measure. The legislature expressly retained, and implied that it would employ the power to amend, alter, or repeal English laws that proved to be unsuitable.[2] The Massachusetts constitution of 1780, while continuing all laws formerly in use "and usually practiced on in the courts of law," also stipulated that they might be abolished at any time by the legislature.[3] Other states, such as New Jersey, Virginia, Delaware, and South Carolina in 1776, New Hampshire in 1784, and New York in 1788, enacted similar provisions or incorporated them in their constitutions.[4]

Soon the state legislatures and the courts began to test every point of English law. Special legislative commissions undertook to investigate state codes, determining which provisions were of English origin, and whether they should be re-enacted or abolished as inimical to democratic institutions. In the spring of 1786 the New York legislature ordered Samuel Jones and Richard Varick to revise and systematize the state's laws, "to the Intent that when the same shall be completed, . . . none of the Statutes of *England,* or of *Great-Britain,* shall operate, or be considered as Laws of this State."[5] In 1798 William Kilty, a Maryland jurist who later became the state's Chancellor, codified the Maryland statutes, omitting some English laws while affirming others.[6] A few years later, in 1808, the Pennsylvania Supreme Court conducted an inquiry on behalf of the legislature and recommended the re-enactment of some of the British statutes still on the books.[7] In Virginia, holdover English laws came under the close scrutiny of a hostile legislature. An act of December 27, 1792, titled "An Act Repealing under Certain Restrictions, all Statutes or Acts of the Parliament of Great Britain, heretofore in Force within this Commonwealth," placed Virginia formally beyond the reach of English jurisprudence.[8]

The reception or rejection of English laws and precedents depended upon the attitudes of the judges and legislators in each of the new American states, and opinions varied considerably. Some states refurbished a large number of English statutes and incorporated them into their codes, while others, more sensitive about their newly-won independence, struck from the books the last statutory vestiges of the British system. However patriotic they might be, policy-makers everywhere borrowed heavily from the English Common Law, as it had been molded by usage in the new world. In 1813 Chief Justice Tilghman of Pennsylvania summarized the situation when he wrote that "every country has its Common Law. Ours is composed partly of the Common Law of England and partly of our own usages." The American colonists brought with them whatever principles of English law they thought appropriate, he continued, and "It required time and experience to ascertain how much of the English Law would be suitable to this country."[9] This trial and error procedure probably was the most reasonable and fruitful method of fashioning a workable legal system out of the surviving mass of foreign and domestic jurisprudence, for it allowed lawmakers to discard inappropriate doctrines while retaining those that harmonized with political and social conditions in America.

Political and cultural nationalism, born of the Revolution and nursed by the War of 1812, increased American suspicion of all things British. After the Revolution, Philip Freneau, the patriot poet, anticipated the attitude of many nineteenth century judges when he asked,

> Can we never be thought to have learning or grace
> Unless it be brought from that horrible place
> Where tyranny reigns with her impudent face?[10]

In 1830 William Ellery Channing, an influential Unitarian clergyman, reminded Americans that "the true sovereigns of a country are those who determine its mind. A people, whose government and laws are nothing but the embodiment of public opinion, should jealously guard this opinion against foreign dictation."[11] Many judges saw the matter in the same light. English precedents

fell into disrepute, and even the Common Law, at least for a time, suffered from "the odium of its origin."[12] In 1784 President John Dickenson of the Pennsylvania High Court of Errors and Appeals wrote that "there was a time — when we listened to the language of [England's] Senates and her courts with a partiality of veneration, as to oracle. It is past — we have assumed our station among the powers of the earth. . . ."[13] In 1801 James Sullivan, the attorney general of Massachusetts, insisted that it would be unbecoming for the courts of the new nation "to repair ordinarily to the sea shore, to listen for opinions recently given in a foreign realm."[14] In 1810 the Pennsylvania legislature with a patriotic flourish made "the reading or quoting of Foreign Precedents in Courts" a criminal offense except in cases of maritime or admiralty law.[15]

The demand that the United States "burn that immense load of legal lumber" inherited from England sprang from the conviction that English law was the product of an aristocratic society, and therefore unfit for America. On the eve of the War of 1812 John Tyler, then Governor of Virginia, harangued the Virginia General Assembly on the evils of English jurisprudence. "Shall we forever administer our free *republican* institutions on the principles of a rigid and high-toned monarchy?" he demanded.[16] In New York, William Sampson, an Irish immigrant lawyer who made his initial reputation as defense counsel for the New York Journeyman Cordwainers in 1810, insisted that English judges, with all their monarchical leanings, were not fit to decide legal questions for Americans.[17] In 1823, when Caleb Cushing, an influential Massachusetts lawyer and politician, argued in the *North American Review* that the law of Coke and Blackstone was "irreconcileably" at war with democratic institutions, he voiced the sentiments of many of his contemporaries.[18]

The idea of progress also contributed to the unpopularity of English jurisprudence. The idea that lay behind Thomas Jefferson's dictum that "the earth belongs to the living, not the dead," was a pervasive and influential concept in nineteenth-century America.[19] And it clashed headlong with legal tradition and precedent. Jefferson in time came to the extreme view that *all* laws should be revised at twenty-year intervals. By starting anew with each generation, he said, the law would keep pace "with the progress of the human mind."[20] Sharing Jefferson's attitude, though he arrived at it independently, James Russell Lowell later mused from Concord:

> New times demand new measures and new men;
> The world advances, and in time outgrows
> The laws that in our fathers' day were best;
> And doubtless, after us, some purer scheme
> Will be shaped out by wiser men than we,
> Made wiser by the steady growth of truth.[21]

In the early days of the Republic many judges accepted the idea that the law should be a mutable product of the present rather than a remnant of the past. Nathaniel Chipman, a leading Vermont judge, argued in 1792 that reliance upon precedent often led to grave consequences. Americans should make decisions for themselves, he argued, and "ought not to yield to former ages the principles and reasons of the present."[22] Jefferson's Republican followers did much to popularize these ideas, both in Virginia and elsewhere. In 1818 the Board of Commissioners for the University of Virginia, a group composed of such influential men as James Madison, Creed Taylor, Spencer Roane, and Jefferson himself, reported to the legislature that education would emancipate men from "the preposterous idea that they are to look backward to better things, and not forward. . . ."[23]

Congressmen as well as Virginia legislators insisted upon a flexible, evolving legal system. In 1816 when the House of Representatives discussed the merits of a bill providing for official reports of cases decided in the United States Supreme Court, a lengthy debate ensued over two issues. The first of these revolved around objections to the proposed $1,000 annual salary for the reporter; the second stemmed from protests against any act which would "sanction the idea of [the reports] having a permanent effect over the law, or make their construction of laws binding on their successors and on other authorities."[24] One can only speculate upon the relative weight of these two objections in the minds of the legislators, but together they formed a serious stumbling block in the way of the bill. The House passed the measure only after repeated urgings from the Senate.[25]

The conviction that the laws of each new age would be an improvement over previous legislation fitted nicely with patriotic sentiments, for both implied confidence in the future of America. As the nation progressed, the law would naturally follow suit. As Nathaniel Haven, the influential editor of the Portsmouth [New Hampshire] *Journal* wrote in 1825, "We should rejoice to find English lawbooks in our courts of justice, as we do to see English machinery in our manufacturies. We have little doubt that we shall improve upon both."[26]

Paradoxically, while patriotic jurists warned against Blackstone's dangerous sophistries, his *Commentaries on the Laws of England,* a bible for Anglo-American lawyers since its publication in the 1760's, continued to run through innumerable American editions.[27] As late as the 1840's professional law journals, presumably responding to the needs and desires of their readers, devoted as much space to reports of English (and sometimes Irish) decisions as they did to cases from American courts.[28] In fact, explained a contributor to Francis Lieber's *Encyclopaedia Americana,* one might have said that "the whole body of English law, as it appears from Westminster Hall, is immediately re-published here."[29] Selective American use of English law had also impressed Alexis de Toqueville during his travels in 1831-1832. The perceptive Frenchman reported that Americans had retained many characteristics of English legal practice, "however repugnant they may be to the tenor of their legislation and the mass of their ideas."[30]

What accounted for this ambivalence in American legal thought? Above all, it stemmed from the fact that until the 1830's or 40's no one could be certain of the independent identity of "American law." As he recalled the hectic first years of the nineteenth century, Chancellor James Kent of New York cryptically remarked, "We had no law of our own, & nobody knew what it was."[31] Although law reports and digests multiplied rapidly after 1800 (by 1821 over 150 volumes had appeared), the legal profession often had to wait years for the publication of crucial decisions.[32] As late as 1842 the official South Carolina court reporters complained that in their state British cases from both before and after the Revolution were still cited in the courts, "not because a number of decisions have

not been made by our own court, but because we have no evidence of them."[33] In the absence of reported domestic decisions, English precedents simply filled the void. For some time after the Revolution, according to Chancellor James Kent, American courts resorted to British cases, following them "with the implicit obedience and reverence due to oracles."[34]

Charity law reflected the general uncertainty and confusion that characterized American law as a whole. In the absence of a uniform federal policy each state worked out its own program in keeping with local conditions and prevalent attitudes. Most states were silent respecting philanthropy in their initial constitutions, probably because they preferred to let their legislatures determine policy. Pennsylvania and Massachusetts, however, revealed their continuing interest in philanthropy by including statements of general encouragement in their fundamental law.

Section 45 of Pennsylvania's first constitution encouraged the founding and guaranteed the property rights of charitable and religious organizations. The origin of this clause illustrated the close relationship between the state's lawmakers and the leaders of her religious and charitable societies. As originally framed by the delegates to the constitutional convention in August, 1776, the constitution said little about religion and nothing at all about philanthropy. This situation worried William Smith, an Episcopal clergyman and the Provost of the College, Academy and Charitable School of Philadelphia. "The Christian religion is paid scant or no respect," he complained, "but is rather considered an indifferent, arbitrary matter. . . ." More specifically, there was no provision concerning the charters, privileges, or legacies which religious and charitable organizations had enjoyed during the colonial period.[35] Intent on drawing the delegates' attention to this oversight, Smith composed an additional clause which he hoped might be included in the final constitution. He did not, however, present the proposal himself. Doubtless aware that his loyalist activities had left him with few friends in the Revolutionary convention, Smith asked Henry Muhlenberg, the patriarch of the Lutheran church in Pennsylvania, to submit the petition as his own.[36]

Muhlenberg agreed with Smith that some kind of constitutional

guarantee was desirable, but he at first doubted that Smith's proposal would be acceptable. The radicals who controlled the convention were unlikely to grant special privileges.[37] Conferences with other clergymen, however, and the encouragement of Benjamin Franklin, reassured Muhlenberg that the petition had the backing of many of the state's most influential citizens. On September 18 he submitted what was in reality William Smith's proposal, though it ostensibly came from the "United German Lutheran Congregations of the State of Pennsylvania." The clause read: "And all religious Societies and Bodies of Men hereto-fore united and incorporated for the Advancement of Virtue and Learning, and for other pious and charitable Purposes, shall be encouraged and protected in the Enjoyment of the Privileges, Immunities and Estate, which they were accustomed to enjoy and might or could of right have enjoyed under the laws and former constitution of this State."[38]

The convention's subsequent action allayed all of Smith's and Muhlenberg's fears. Indeed, they must have been surprised at the eagerness of the delegates to incorporate their petition in the constitution almost verbatim. Because of the concern of William Smith, Henry Muhlenberg, Benjamin Franklin, and a host of other public-spirited Pennsylvanians, Section 45 of the Pennsylvania constitution enacted Smith's clause substantially as offered.[39]

Although the Pennsylvania constitutional revision of 1790 struck out many provisions of the 1776 version, the rights and privileges of religious societies and corporate bodies were to remain "as if the constitution of this State had not been altered or amended."[40] A year later the Pennsylvania legislature passed an act facilitating, but not requiring, the incorporation of societies, "for any literary, charitable, or for any religious purpose."[41] Unlike some other states, Pennsylvania protected the rights of both incorporated and unincorporated charities. According to a report of the state Supreme Court to the legislature in 1808, English mortmain statutes still in effect in Pennsylvania outlawed conveyances to unincorporated societies, unless they were "calculated to promote Objects of charity or Utility."[42]

In 1777, a year after William Smith had indirectly written

Pennsylvania's constitutional clause protecting charities, the state of Vermont copied it almost verbatim in Chapter II, Section 41 of her first constitution, an indication that Vermonters also considered charitable and religious organizations beneficial to society.[43]

The Massachusetts constitution of 1780, reflecting the traditional Calvinist emphasis upon education and the state's historic interest in Harvard College, stressed the encouragement of public and private educational institutions. Grants, devises, gifts, and bequests to Harvard would be sustained, said the constitution, however poorly phrased the deed or will might be. Encouraging all other types of charity as well, the constitution also enjoined the state's legislators and magistrates "to countenance and inculcate the principles of humanity and general benevolence, public and private charity . . . among the people."[44] As Vermont had copied Pennsylvania's constitutional encouragement of philanthropy in 1777, so in 1784 New Hampshire followed Massachusetts' lead and incorporated the Bay State's provisions into the New Hampshire constitution.[45]

Other states, whose constitutions did not specifically encourage philanthropy, nevertheless displayed a friendly attitude toward charitable trusts and uses during the first decades of national independence. Rhode Island and Connecticut both continued to operate under colonial statutes which had been closely modeled on the Statute of Elizabeth, and which were if anything even more permissive. The Rhode Island "Act to Redress the Misemployment of Lands, Goods, and Stocks of Money, heretofore given to certain Charitable Uses" (1721) was virtually a literal copy of the Statute of Elizabeth, except that for the list of twenty-one uses it substituted simply "for the Relief of the Poor, and bringing up of Children to Learning." In 1844 the Rhode Island legislature added "or for any other specific purpose . . . ," thus removing any doubt as to the breadth of the state's permissive policy.[46]

A Connecticut statute of 1684 provided the basis for her post-Revolutionary encouragement of charitable uses. The act stated that all estates that had been, or ever would be, granted for the support of religion, education, poor relief, "or for any other public and charitable use," should be confirmed for the uses intended by the donor. The statute, which remained in force well into the

twentieth century, kept charitable bequests from being diverted into other, perhaps less worthy channels.[47]

A statute of 1784 reflected New York's regard for charitable uses at the close of the Revolution and indicated how far the legislators were willing to stretch legality in order to support potentially beneficial charities. According to its preamble, the purpose of the act was to resolve the difficulties caused by "the illiberal and partial distribution of charters of incorporation to religious societies, whereby many charitable and well disposed persons have been prevented from contributing to the support of religion, for want of proper persons authorized by law to take charge of their pious donations." Moreover, many estates originally purchased and donated for the support of religious societies had passed into private hands, "to the great insecurity of the society for whose benefit they were purchased or given, and to the no less disquiet of many of the good people of this state. . . ."[48] To put an end to these problems the act provided that each congregation in the state should elect a group of trustees, who would then have the power to manage the secular affairs of the congregation. Clearly placing immediate social benefit above sophisticated legal doctrines, the act stated that the trustees could receive lands, gifts, bequests, and the like, either for the congregation or in trust for the use of others, even though the donations "may not have strictly been agreeable to the rigid rules of law, or might on strict construction, be defeated by the operation of the Statutes of Mortmain. . . ."[49]

In the 1820's and '30's both New York and Pennsylvania, states which from colonial times had stretched the law to the breaking point in order to encourage philanthropy, suddenly veered off in a restrictive direction. After passage in 1813, there had been considerable judicial debate over the application of the New York Statute of Wills. To what extent did the act limit a donor's power to give? In 1829, in order to clarify the nature of the act, the legislature incorporated in the revision of the New York Statutes a positive prohibition modeled on the English mortmain statutes.[50] Designed to prevent the withdrawal of any appreciable amount of real or personal property from public circulation by placing it in the hands of a religious or charitable society, the act stated that

"no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise."[51] In contrast to the extremely lenient attitude displayed by the act of 1784, the New York legislature now enacted rigid controls and demanded adherence to the letter of the law. Strictly interpreted, the statute virtually abolished trusts in the state of New York. Chancellor James Kent, distressed by this change, declared that it was "one of the most questionable undertakings in the whole business of the revision." In their attempt to correct abuses and to simplify the complexities involved in conveying property, the legislators had gone too far. "The boundaries prescribed will prove too restricted for the future exigencies of society," predicted Kent, "and bar the jurisdiction of equity over many cases of trusts which ought to be protected and enforced. . . ."[52]

Shortly thereafter, the Pennsylvania legislature, a long-time advocate of a permissive charity policy, began to balk at incorporation petitions from charitable associations. In both 1831 and 1832 the legislative committee on corporations refused either to renew or to grant charters to missionary societies, church congregations, library companies, and charity schools and hospitals.[53]

Both Pennsylvania and New York were following a trail blazed by Virginia three decades before. In the last phases of Virginia's struggle to separate church and state, philanthropy had been dragged into the battle. At first the assembly had continued the generally permissive policies of the colonial period. Jefferson's bill exempting dissenters from contributing to the support of the church (1776) had guaranteed each parish "the perpetual Benefit and enjoyment" of any private donation it might have received.[54] Twelve years later, clarifying the powers of the trustees of the disestablished Protestant Episcopal Church, the assembly was still reluctant to interfere with religious charities. The trustees of the Church, declared the assembly, were to be considered the successors to the former vestries, and could hold and manage all property vested in them, "whether for charitable purposes by private donation, or in trust for the use of individuals." Similarly the act of 1801, which transferred the parish glebe lands to the county overseers of the poor, specifically stated that nothing in the act should

be construed to affect "property of any kind which may have been acquired by private donations. . . ."[55]

During the next six years the climate of opinion changed. Having successfully broken the political power of the Church, Virginia's zealous champions of religious liberty wanted to curtail its control of property. In 1806 the assembly drafted an act providing that "Where, previous to [January 13, 1806], any donation was made of money or any other thing, for a charitable purpose, and the donation was to be controlled or managed by a vestry, the overseers of the poor of the county or town in which the said charity was intended by the donor to be exercised shall exercise the same powers and duties . . . and shall apply such money or other thing in such manner as may have been directed by the donor."[56] With this statute disestablishment reached its logical conclusion.

In the years following 1806 the Virginia legislature refused charters of incorporation to innumerable religious charities and to many secular societies as well. By 1833 Henry Saint-George Tucker, the President of the Virginia Supreme Court of Appeals, could observe with considerable justification that "no man at all acquainted with the course of legislation in Virginia, can doubt, for a moment, the decided hostility of the legislative power to religious incorporations."[57] Tucker might have added that the delegates to the Virginia constitutional convention of 1829 had gone even further in voicing suspicion of all philanthropic associations.[58] By the 1830's Virginia had developed a restrictive charity doctrine whose influence extended far beyond the boundaries of the Old Dominion.

CHAPTER 3

The Supreme Court and the Virginia Doctrine

"THE NEXT TERM OF THE SUPREME COURT," WROTE JOSEPH STORY to his colleague Henry Wheaton in December, 1818, "will probably be the most interesting ever known."[1] The docket for the February, 1819, term was crowded with significant cases, including *Sturges v. Crowninshield, Dartmouth College v. Woodward,* and *M'Culloch v. Maryland,* decisions in which Chief Justice John Marshall vigorously asserted the supremacy of the federal government and the sanctity of contracts. In addition to these well-known decisions, Marshall also ruled on the case of the *Philadelphia Baptist Association v. Hart's Executors,*[2] a case which, though overshadowed at the time by others involving political and economic questions, contributed to the ultimate creation of an American law of charity.

The case arose from a dispute over the will of Silas Hart, a citizen of Virginia who in 1790 had devised the principal and interest on his military certificates (approximately £50), to the Baptist Association of Philadelphia, to be used to educate Baptist youths for the ministry. Hart died in 1795. When his executors refused to deliver the bequest, the Baptist Association sued for the money in the Rockingham County, Virginia, court of chancery. The rul-

ing of the court was important not only for the Philadelphia Baptist Association but for Virginia Baptists generally. The loss of the suit would set a precedent which might in the future defeat other philanthropic gifts.[3] Consequently, after an adverse decision in the Rockingham court, the Association carried its case on appeal through the Virginia state courts, and finally appealed to the United States Supreme Court in 1819.

At the February, 1819, term of the Supreme Court, Benjamin Watkins Leigh, counsel for the executors, argued that the Baptist Association could not take Hart's bequest because the society had been unincorporated at the time of his death. Furthermore, with its ill-defined and ever-changing membership the Association was too vague and uncertain to constitute a legal beneficiary. Leigh also argued that the belated incorporation charter, granted by the Pennsylvania legislature in 1797, could not save the bequest. Under Virginia law no unincorporated society could take personal property by devise. Leigh conceded that in England, under the equity powers granted the courts of chancery by the famous Elizabethan Statute of Charitable Uses, Hart's philanthropic intentions would have been sustained even without a charter of incorporation.[4] But, he argued, that statute had fallen in December, 1792, when the state legislature struck from Virginia law all statutes or acts of the British Parliament.[5] Leigh insisted that under Virginia law, "which must govern in this case," no court could enforce Hart's trust.[6]

In opposition to Leigh's contention that judicial power to enforce vague charitable trusts rested solely on the Statute of Charitable Uses, counsel for the Baptist Association maintained that even before 1601 English Chancery courts had sustained bequests as uncertain as Hart's. And since the federal Constitution gave the Supreme Court original jurisdiction both in law and equity in suits between citizens of different states, Virginia's repeal of the statute was of no consequence. In other words, the Supreme Court could enforce the trust through its equity powers.

Chief Justice John Marshall decided the case in favor of the executors, and in so doing frustrated Hart's charitable design. Marshall held that since the Association was not incorporated at the time of Hart's death, it could not receive the trust. "According

to the law," he observed, "it is gone forever."[7] Justice Story concurred, but did not deliver his opinion because, as he later explained, "that of the Chief Justice was so satisfactory to me that I did not deem it necessary to deliver my own."[8]

What was of paramount importance was Marshall's acceptance of the view that the court's jurisdiction in charity cases originated in the Statute of Charitable Uses. Leigh had stressed this in his argument, and Daniel Webster had recently made the same point in the Dartmouth College Case.[9] "We have no trace, in any book," concluded the Chief Justice, "of any attempt in the [English] Court of Chancery, at any time anterior to the Statute, to enforce one of these vague bequests to charitable uses."[10]

The confident tone of Marshall's opinion and Story's concurrence helped to conceal the Court's basic confusion in respect to charity law. Though the staunchly Federalist Court expressed consistent opinions respecting the sovereignty of the federal government and the inviolability of contracts, in the matter of charity law Marshall and his colleagues showed considerable uncertainty. The Hart decision, in fact, stood in curious contrast to other pronouncements by Story and Marshall.

In the case of *Terrett v. Taylor,* decided in the Circuit Court for the District of Columbia in 1815, Story had in effect approved a permissive policy toward both incorporated and unincorporated religious or charitable societies. He held as unconstitutional a Virginia act of 1802, by which the state had confiscated all the property of the Episcopal Church acquired prior to 1776. Permitting every sect equally to establish funds "for the support of ministers, for public charities, for the endowment of churches, or for the sepulchre of the dead," Story argued, did not infringe upon the freedom of religion as the act had claimed. And that these activities were more secure if guaranteed corporate privileges, "cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations." Moreover, even without the security of a corporate charter the courts should assist religious and charitable societies. "In our judgment," remarked Story, "it would make no difference whether the Episcopal Church were a voluntary society, or clothed with corporate powers; for in equity, as to objects

which the law cannot but recognize as useful and meritorious, the same reason would exist for relief in the one case as the other."[11]

The contrast between the Hart case and the case of *Dartmouth College v. Woodward* illustrated Chief Justice Marshall's apparent uncertainty regarding the proper application of charity law. His decision in the Hart case frustrated a donation for the education of Baptist ministers, yet in the Dartmouth College case Marshall asserted that any government "must be disposed rather to encourage than to discountenance" educational philanthropies.[12] A more fundamental inconsistency, however, involved the principle of the inviolability of a testator's charitable wishes. In sharp contrast to the inhibitive temper of the Hart decision, Marshall declared that the New Hampshire legislature should not be permitted to alter the Dartmouth College charter because such action would discourage philanthropy. Borrowing freely from Daniel Webster's argument, Marshall observed that "it requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable." Marshall continued, "All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it."[13]

In spite of the uncertainties surrounding the Hart decision, inferior courts soon cited and followed the ruling. Its restrictive doctrines, supported by the reputations of Story and Marshall, threatened to control the future evolution of American charity law. In July, 1826, the Connecticut Supreme Court of Errors followed the Hart decision and ruled unanimously against the devise of a farm to a yearly Quaker meeting.[14] Paralleling Silas Hart's instructions to the Philadelphia Baptist group, the testator had instructed the yearly meeting to use the income of the farm to help support a Quaker charity school. Like the Baptist Association, the Quaker society was unincorporated. Chief Justice Stephen Hosmer, speaking for the court, observed that in the past courts of equity had gone too far, "frequently coercing" the execution of vague bequests for charitable purposes. The Hart case, he concluded, was "in no essential particular, distinguishable from the case before the court."[15]

The courts of Virginia and Maryland even more emphatically adopted a restrictive charity doctrine. In 1832, when the Virginia court decided the case of *Gallego's Executors v. the Attorney General,* it both followed and extended Marshall's reasoning in the Hart decision.[16] Joseph Gallego, who had died in 1818, left $1,000 to the Roman Catholic Chapel in Richmond, a plot of land to be used as a church site, $3,000 to aid in building a new Catholic church, and $2,000 for the support of needy and respectable widows. When Gallego's heirs refused to deliver the bequest, the Church appealed to the Attorney General for relief. Counsel for the heirs, the same Benjamin Watkins Leigh who had represented Hart's executors, used the same argument that had proved so effective fourteen years earlier before Marshall and Story. The Virginia court accepted Leigh's reasoning, and based its opinion on the Hart ruling. On the question of whether charity jurisdiction depended upon the Statute of Charitable Uses, Justice Dabney Carr simply stated that Marshall's opinion had definitely settled the matter.[17]

Henry Saint-George Tucker, President of the Court, went even further. Tucker feared that uncontrolled charitable bequests to the Church would give it too much power in society. Referring to the situation in medieval England, where vast tracts had been bound up by mortmain, Tucker cautioned that the Church, "if made capable to take, . . . never can part with any thing." Unless Virginia acted quickly to curb bequests to religious organizations, the "whole property of society" would be "swallowed up in the insatiable gulph of public charities. . . ."[18] Tucker concluded that if the state of Virginia had ever followed a permissive charity doctrine, it had been "silent and quiescent" for centuries. If anyone revived the "pernicious principle" and permitted unregulated giving, he added, it would be the legislature, not the courts.[19]

Although Tucker had qualified his outspoken opinion by stating that he feared only religious charities because of the evils of mortmain, and that the overall "benign and salutary influence" of philanthropy was not banished from Virginia, his restrictive outlook soon affected secular charities as well. The following year the case of *Janey's Executor v. Latane et al* demonstrated that the principles of the Hart and Gallego decisions might apply to other

kinds of charitable devises. In this instance Justice Dabney Carr invoked the Gallego case to strike down a bequest of $1,000 for the education of poor children in a particular school district, on the ground that it was impossible to identify the beneficiaries.[20] By 1833 the Virginia courts had already embraced the broad restrictive policy that came to be known among lawyers as "the Virginia Charity Doctrine."[21]

The courts of Maryland, even more quickly than those of Virginia, adopted the Hart ruling. Only four months after Marshall's decision, the Maryland Court of Appeals dismissed a legacy to "the real distressed private poor of *Talbot* County" as being too vague and uncertain.[22] The case of *Dashiell et al v. the Attorney General,* decided by the same court in June, 1822, served to commit Maryland even more completely to a restrictive charity policy. In refusing to enforce a bequest for the care and education of poor children in Caroline County, and those belonging to an Episcopal congregation in Baltimore, Justice John Buchanan relied primarily on Marshall's opinion, "in which all the principal authorities are reviewed, and the subject very fully investigated."[23] The "peculiar law of Charities," he affirmed, originated in the Statute of Charitable Uses. This statute had in effect been repealed in 1798 when William Kilty omitted it from his official compilation of Maryland laws. While the whole question of charity law was extremely complex, Buchanan concluded, Kilty's compilation was a "safe guide in exploring an otherwise very dubious path."[24]

The emerging law of charity followed an even more indistinct course than Justice Buchanan supposed. The opinions which followed the restrictive temper of the Hart decision reflected more the drift of popular sentiment than the influence of legal logic. Even in Virginia a permissive law of charity had not, in Henry Saint-George Tucker's words, been "silent and quiescent" in the preceding decades.

In an early case decided by the Virginia Court of Appeals, *Charles v. Hunnicutt* (1804), the Virginia justices argued for a permissive policy toward charitable trusts. Gloister Hunnicutt, a Quaker, had drawn a will in 1781, bequeathing his slaves to the monthly meeting of which he was a member, with instructions

that as soon as the Virginia legislature legalized manumission, the slaves were to be freed. Virginia passed such an act in 1782, but Hunnicutt's executors continued to hold the slaves, who consequently sued for their freedom. The Quaker meeting was an unincorporated society, but the Court of Appeals did not view this as an obstacle to the fulfillment of Hunnicutt's charitable intentions. Neither counsel in their arguments nor the justices in their opinions mentioned the repeal of the Statute of Charitable Uses in Virginia. Justice William Fleming ruled that "the objection of uncertainty in the devise has no weight; for not only are bequests to charitable uses expounded favourably, but it is a rule, that a devise is never construed to be void from uncertainty; . . . for if there be a possibility of reducing it to a certainty, it will be supported."[25]

In ignoring the Hunnicutt case Chief Justice Marshall, Justice Story, and the judges who decided the Gallego case were guilty of no more than an oversight, probably an unavoidable one. Often lawyers had to wait years for reliable published reports. The Hunnicutt case, though decided in 1804, was not published until 1833, a year after the Gallego decision. Henry Saint-George Tucker, who attacked religious philanthropies in the Gallego case and thus helped crystallize Virginia's restrictive policies, might conceivably have been familiar with the earlier decision. His father, Saint-George Tucker, was one of the justices who ruled in favor of the charity in the Hunnicutt case. There is, however, no evidence of such familiarity.

Had the justices in the Gallego case wanted to justify a more permissive policy, they could have cited another Virginia decision, *The President and Professors of William and Mary College v. Hodgson et al,* which had been decided by the Supreme Court of Appeals in 1818, and published in Richmond in 1821.[26] In this case the justices, acting under *cy pres,* a principle allowing a court to re-direct or adjust a charity whose original purpose could no longer be fulfilled, sustained a gift of "five hundred Winchester bushels of Indian corn" annually for the use and benefit of a free school.[27] But the judges ruling in the Gallego case chose to follow the Hart decision, and President Tucker mentioned the Hodgson case

only to condemn it. The application of *cy pres,* he complained, perpetuated instead of limiting the dangers that stemmed from uncontrolled giving.[28]

In the late 1830's Virginians discovered that the restrictions imposed by the Hart and Gallego decisions complicated the legal status of religious bodies and, by hamstringing gifts intended for education, poor relief, and other necessary social services, proved costly to the whole society. In 1836 Justice Dabney Carr, apparently forgetting his opinions in the Gallego case and the case of Janey's Executor, asserted that it had always been "the anxious effort of the courts to carry into effect last wills and testaments" containing charitable provisions.[29] Three years later the Virginia legislature tried to alter the course of the state's charity law by declaring that gifts, devises, and bequests for literary purposes or for the education of white citizens (except for theological studies, which were still suspect), were valid "whether made to a body corporate or unincorporated. . . ."[30]

Maryland likewise tried to retreat from the position she had taken in the Dashiell case. In 1842 the Maryland legislature gave the city of Baltimore permission to receive and execute trusts conferred upon it for charitable purposes,[31] but by this time both states were hopelessly entangled in their restrictive policies.[32] The major and decisive arguments for a permissive policy came from northern jurists and from lawyers like Horace Binney of Pennsylvania, who complained that southern justices did not appreciate "how much the virtue and dignity of a State depend on protecting charities for religion and letters, as well as for the relief of the poor and sick."[33]

CHAPTER 4

American Answers to American Questions

IN 1827 CHANCELLOR JAMES KENT OF NEW YORK, ONE OF THE great framers of American equity law, complained that the Hart decision had "thrown embarrassment" over the question of whether equity courts could enforce charitable trusts without the sanction of the Statute of Charitable Uses.[1] If their jurisdiction depended solely on the Statute, as Marshall had claimed in 1819, then the courts were powerless to enforce "some of the most interesting and meritorious trusts that can possibly be created and confided to the integrity of men." The accuracy of Marshall's conclusions, Kent observed critically, "remains yet to be established by judicial sanction."[2]

The critics of the Hart ruling concentrated their attacks on the idea that the Statute of Charitable Uses was the fountainhead of philanthropy. They asserted that charitable uses owed their legal standing to custom and social need, and not to any specific legislative enactments. To establish this point they tried to demonstrate that English chancery courts had defended and enforced charitable trusts before the Statute's passage in 1601, and that in any event equity jurisdiction over such trusts also rested on long-standing domestic usages, independent of English precedents.[3]

In 1827 the Pennsylvania Supreme Court decided the case of *Whitman v. Lex,* the first in a series of decisions that challenged the Hart ruling. In 1816 the testator, George Woelpper, had bequeathed a fund to provide bread for the poor of a German Lutheran congregation in Philadelphia, and $5,000 for the training of Lutheran ministers.[4] Woelpper's heirs claimed that the bequest was too uncertain to be carried out. Chief Justice John Gibson upheld the trust, and in doing so stated that the court had jurisdiction independent of English statutes. Throughout Pennsylvania's colonial history, he argued, the courts had enforced vague and even poorly-phrased bequests to congregations, even though these bodies lacked the legal protection of formal incorporation. Colonial judges had acted on the principle that custom had the force of law. "Surely," Gibson concluded, "a usage of such early origin and extensive application may claim the sanction of a law; resting, as it does, on the basis of all our laws of domestic origin — the legislation of common consent."[5]

It was, however, an English Records Commission that provided the ammunition for a frontal attack upon the restrictive principles asserted by Marshall and adopted by the courts of Maryland and Virginia. A Royal Commission, appointed to search for unreported chancery cases from the Middle Ages, published its findings in 1827. The two-volume *Calendars of the Proceedings in Chancery* showed conclusively that English courts had indeed enforced charitable trusts long before 1601. Armed with these newly-discovered cases, American jurists proceeded with unusual candor to assail the Marshall decision of 1819.

The first significant challenge came in the case of *McCartee v. the Orphan Asylum Society,* decided by the New York Supreme Court in December, 1827. The case arose from a dispute over the will of Philip Jacobs, who had bequeathed the residue of his estate to the New York Orphan Asylum Society. According to Jacobs' instructions, the bequest was to take effect as soon as all debts and legacies were paid, unless one of his children was living at the time, in which case the child was to receive the benefit of the estate until his death, his marriage, or until he reached twenty-one. The residue would then go to the Orphan Society. Upon the death in

infancy of Jacobs' only child, the Orphan Society sued the executors for its share of the estate.

In the course of his extremely detailed, sixty-three page opinion upholding the trust, Chancellor Samuel Jones ranged far beyond the requirements of the case and discussed the general problem of equity's power to enforce charitable bequests. Flatly contradicting Chief Justice Marshall, whose opinion in the Hart case he dismissed with almost insulting brevity, Jones asserted that "from the times of highest antiquity, and long before the Statute of Elizabeth, . . . the equity powers of the court were applied . . . to cases of charitable uses."[6] Jones made good use of the British chancery records, buttressing his contentions with innumerable examples dating from the sixteenth century. The Chancellor, however, was no mere legal antiquarian; he adopted a pragmatic view of the social value of philanthropic bequests. Calling for a liberal policy, one that looked more to a donor's intentions than to the technicalities of the law, Jones asked, "Must the benevolent intention of the testator be frustrated, merely because the agents he has chosen to dispense his bounty are incapable of acting in the trust? Such a lamentable defect of justice would be a reproach to our system of jurisprudence."[7]

Whitman v. Lex and *McCartee v. the Orphan Asylum Society* were clear signs of growing opposition in the state courts to a restrictive charity doctrine. These two cases also served to set the stage for the case of *Magill v. Brown,* in which Henry Baldwin, an almost forgotten Justice of the United States Supreme Court, successfully challenged the Hart ruling in federal law.

Baldwin was a native of Connecticut and a graduate of Yale and made his initial legal and political reputation in Pittsburgh.[8] In 1829 Andrew Jackson appointed him to the Supreme Court, filling a vacancy left the previous year by the death of Justice Bushrod Washington. It was a popular nomination with rank-and-file Democrats, and even Joseph Story, normally at odds with Jackson and Jacksonians, wrote to Mrs. Story that Baldwin's appointment was "quite satisfactory to those who wish well to the country and the court."[9]

At the time of his appointment to the federal bench Baldwin had already earned the reputation of a tireless and painstaking legal

scholar. In Philadelphia he had studied with Alexander J. Dallas, one-time Master in Chancery on the British island of Jamaica and later the first United States Supreme Court reporter. From Dallas Baldwin gained a thorough knowledge of English as well as domestic law. This background, plus the resources of his private library, reputedly one of the finest in the West, made him particularly well qualified to resolve the complex questions of public policy raised by the Hart decision.

As a member of the Court, Baldwin proved to be an active dissenter who refused to go along with Marshall and Story as they enlarged the sphere of federal jurisdiction and asserted the sanctity of contracts. In 1831 alone he dissented seven times. Six years later he published a blistering criticism of Story's *Commentaries on the Constitution.*[10] Perhaps because of his opposition to the Federalist temper of the Court in Washington, Baldwin did his most significant work while on the circuit. During the April, 1833, term of the United States District Court for the Eastern District of Pennsylvania, he delivered a decisive ruling in the case of *Magill v. Brown.*

The case grew out of the will of Sarah Zane, a public-spirited Philadelphia Quaker interested in the activities of several Friends' meetings besides her own. In a will drawn in March, 1819, she bequeathed sums ranging from $200 to $1,000 to meetings in Winchester and Hopewell, Virginia, in Baltimore, and in Philadelphia. To each meeting (except her own, which received $300 for Indian relief and an eight-acre tract of land), she gave $500 for their own use. Each of five monthly meetings of women Friends in Philadelphia received $200 for the purchase of ground rents, whose profits would help support each meeting's poor. She earmarked an additional $1,000 gift to the Baltimore meeting for the civilization of an Ohio Indian tribe, gave an extra $500 for enlarging the Winchester meeting house, and donated $1,000 to the town of Winchester for the purchase of fire-fighting equipment.[11]

Baldwin's ruling in *Magill v. Brown* revolved around three fundamental questions, none of which had as yet been satisfactorily answered by American courts: (1) Could unincorporated Quaker societies take real or personal property by devise as beneficiaries,

or (and even more important, for this was the issue in the Hart case), could they take it in trust for others? (2) Was a requirement that religious societies be incorporated in order to hold property an infringement of religious freedom? (3) Finally, what were the pious and charitable uses for which donations could be made by deed or will?

The amounts of property at stake in the case were relatively insignificant, and scarcely warranted Baldwin's elaborate opinion. What prompted him to examine the whole legal foundation of charitable uses and trusts was his concern over the restrictive drift of American charity policy following the Supreme Court decision of 1819. Looking back over Pennsylvania's long history of religious toleration and official encouragement of philanthropy, Baldwin thought it surprising and a little incongruous that the legal status of charities was so confused. "If there be any subjects on which the law could be supposed to be settled," he remarked, "it would be the rights of religious societies and charitable establishments."[12] Yet in 1819 the Supreme Court had ruled against a devise to the unincorporated Baptist Association, and Pennsylvania's legislature and her courts had moved in the same direction. In *McGirr v. Aaron* (1829) and *The Methodist Church v. Remington* (1832) the state supreme court had been "guided by the policy of the legislature" and refused to enforce devises to two religious charities.[13] "Hence arises the importance, as well as the delicacy, of the questions involved in this cause," Baldwin explained. "To consider them open after the declared opinion of both departments of the government, may seem to indicate a want of respect to their authority, but when we feel convinced that there is a law of higher obligation which must guide our judgment, we are bound to follow it."[14]

Skillfully synthesizing the *Whitman v. Lex* and *McCartee* opinions with his own exhaustive research, Baldwin argued convincingly for a charity policy based upon American social conditions. He challenged the Hart ruling by demonstrating that the Statute of Charitable Uses had been merely a piece of remedial legislation, which aimed only at streamlining a long-established but ponderous charity system. It was absurd to claim that the Zane will was void

because Pennsylvania had never adopted a specific statute, and an English statute at that. "We may now assume these principles to be settled," Baldwin declared, "that usage and custom have the force of laws. . . ."[15] And in Pennsylvania, he continued, the whole history of the colony and state demanded that a judge encourage philanthropy, that he "advance the public and suppress the private object."[16]

Moving to the specific questions before the Court, Baldwin showed that by common consent Quaker societies and other unincorporated bodies had always enjoyed the right to hold property in Pennsylvania, either for themselves or in trust for the benefit of others. Furthermore, since charity was in a sense a form of worship, to say in effect that a religious society needed legislative permission to manage a bequest implied "that the rights of conscience and worship could be made dependent on the discretion of the legislature." Nothing was so repugnant to religious liberty, Baldwin noted, as a legislature armed with the power "to license one society to do what they prohibit to another."[17] Baldwin's point respecting religious liberty had been obvious to Virginia Baptist leaders even before the Hart case reached the Supreme Court in 1819. In 1810 Robert Semple had observed that the ruling of the Virginia Court of Appeals against Hart's bequest in effect forced Virginia Baptists to choose between their property and their principles.[18] Baldwin, by insisting that religious and charitable societies need not be incorporated, secured their property holdings and at the same time sustained religious freedom.

But what were valid charitable uses? Baldwin maintained that the twenty-one acceptable uses listed in the Statute of Charitable Uses had been only suggestive, and in no way inclusive. From the *Calendars of the Proceedings in Chancery* and other early sources he compiled an almost overpowering list of uses approved by the English courts before 1601. These included the support of ministers and priests and the building of churches, various types of educational philanthropy and poor relief, the support and care of the mentally and physically handicapped, and for good measure "such uses as concur in decency and good order with the intent of the founder."[19] But even beyond these comprehensive English precedents, Baldwin continued, such charities as Sarah Zane's bequests for Indian relief and fire-fighting equipment (about which English law was silent), could be justified. He took the pragmatic view that the law should keep pace with and reflect the changing needs of society. "Words," he said, "will be construed in their most liberal and expanded meaning. . . ." The American Indian was obviously a poor, miserable person who deserved the fostering care of charity. Likewise, speaking of the fire-fighting equipment Baldwin asserted that "we should administer the law of charity in this state, with little regard to its principles, in excluding from its protection so laudable an object as this."[20] All the provisions of Sarah Zane's will, Baldwin concluded, should be "faithfully and religiously observed and executed."[21]

The real significance of the decision, however, was that it was the first complete and authoritative statement in federal law of a charity policy tailored to the needs of American society. Baldwin, though by no means scoffing at the heritage of English law, joined many other judges of his day in calling for less reliance on English precedent and more emphasis upon American practice. "It is the true principle of colonization," he observed, "that the emigrants from the mother country carry with them such laws as are useful in their new situation, and none other."[22] His highly technical, academic opinion lacked the literary luster of Channing's *Remarks on National Literature,* published three years earlier, but it was nonetheless an impressive plea for cultural independence. While Channing demanded literary originality, Baldwin called for legal self-sufficiency, and more willingness "to seek American answers to American policy questions."[23]

Not all northern jurists followed Baldwin's advice. During the eleven years between *Magill v. Brown* and the Supreme Court's final repudiation of the Hart decision, the peculiarities of charity law continued to trouble the supreme courts of other northern states. The reputations of Marshall and Story carried great weight; it was difficult to overturn their decisions completely. Some judges accepted Baldwin's evidence and reasoning as binding, others wished for a similar analysis based upon conditions in their own states. The case of *Burr v. Smith* reflected the first inclination.

Joseph Burr of Vermont had devised nearly $96,000 to religious and charitable societies throughout the United States. His heirs, who received the residue of the estate, bitterly contested the will before the Vermont supreme court.[24] The counsel for the charitable societies asserted that Marshall's opinion in the Hart case, if put into practice, would "prostrate almost all the property belonging to the religious and charitable associations of the country." The court, agreeing that this would be disastrous, ruled in support of Burr's bequests.[25] Two years later Reuben Walworth, an outspoken Chancellor in New York, went on record respecting the Hart ruling: "I believe it is generally admitted that the decision in that case was wrong."[26] Yet a few months after Walworth's unqualified pronouncement the Vice Chancellor of New York, William McCoun, expressed doubt that *Magill v. Brown* really settled charity law questions in his state. Then in 1839 a justice of the Massachusetts supreme court, Samuel Wilde, voiced similar reservations.[27] In spite of Henry Baldwin's exhaustive researches and closely reasoned opinion, some northern jurists still disputed the origins of equity jurisprudence in charity cases, and Maryland and Virginia remained hostile to philanthropic trusts. The nature of the law of charity was still a live issue in 1844 when the famous Girard Will Case came before the United States Supreme Court.

In 1777 Stephen Girard, a successful merchant captain at the age of twenty-seven, settled in Philadelphia. He quickly expanded his fleet of trading ships, opened his own banking house in 1812, and by the time of his death in December, 1831, had amassed the largest fortune in America.[28]

Girard left a long and extremely detailed will. After bequeathing more than $200,000 to his relatives in France, he devised the bulk of his estate (worth some $7,000,000) to the city of Philadelphia, in trust to establish a college for poor white orphan boys. Among the endless instructions concerning the project was the stipulation that no minister or ecclesiastic of any sort should ever be allowed on the premises. Girard, a thoroughgoing Deist, hastened to explain that he was not anti-religious. On the contrary, he wrote, all the instructors in the college were to be pious and dedicated men, and were to inculcate the "purest principles of morality." Girard

only wished to keep "the tender minds of the orphans . . . free from the excitement which clashing doctrines and sectarian controversy are so apt to produce."[29]

Girard's heirs, whose avarice exceeded their gratitude, assailed the will in the United States Circuit Court, and in 1843 they carried their complaints to the Supreme Court on appeal. At the first hearing, however, three of the justices were absent, one of them being Story, an acknowledged specialist in equity law. Because the case warranted a full bench, and probably because the undermanned Court was frankly confused by the complex issues involved, a rehearing was scheduled for the following year. At the rehearing in 1844 the heirs claimed that the will was void on three counts. The city could not legally take the devise; the trust was too vague and uncertain to be enforced; and finally, Girard's exclusion of ecclesiastics was at odds with the Christian religion, which had been declared to be an integral part of Pennsylvania's common law. Meanwhile, because of the valuable property at stake, both parties to the dispute had strengthened their positions by hiring the best legal talent available. In addition to Walter Jones, their original counsel, the heirs retained Daniel Webster. Countering this move the city reinforced its attorney, John Sergeant, by calling out of retirement Horace Binney, the foremost member of the Philadelphia Bar.[30]

On February 2, 1844, Jones opened the case, taking essentially the same view of charitable trusts that Marshall had asserted in the Hart case. Three days later Binney presented his argument in support of the will. He showed that both by its original charter of 1702, and by a special act of the Pennsylvania legislature, the city of Philadelphia could receive and execute Girard's trust. Confessing his indebtedness to Justice Henry Baldwin, Binney explained the origins of equity jurisdiction in cases of charity law.[31] Of *Magill v. Brown* Binney told the Court, "The judgment in that case, has shed a strong and broad light over the whole subject of charitable uses. It has done much more. It has drawn from depths far beneath the surface and placed in this light, much of the learning, which in a course of ages, has been covered up and concealed from the general view of the profession; and it is by these labours

of the learned judge, that in two or three particulars only, further researches have been suggested and prosecuted."[32] Binney, piling fact upon fact, gathered together virtually all that was known about the legal foundations of philanthropy. The correspondent covering the case for the *New York Herald* reported at the conclusion of the argument that Binney "took the Court and the rest of the counsel into deeper water than they commonly swim in."[33]

In contrast to Binney's detailed analysis of charity law, Daniel Webster responded with a three-day oration upon the anti-Christian character of Girard's plan. The exclusion of ministers, he asserted, was "derogatory to the Christian religion, tending to weaken men's respect for it and their conviction of its importance." Since the Pennsylvania supreme court a few years before had declared Christianity to be part of the state's common law, Girard's entire project was "contrary to public law and policy."[34]

No one disputed Webster's oratorical skill, but in this instance few thought his arguments convincing. Justice Story, who presided over the Court because of the illness of Chief Justice Taney, concluded that it was merely "an address to the prejudices of the clergy." The case had assumed a semi-theological tone, Story related to his wife. "I was not a little amused . . . to find the Court engaged in hearing homilies of faith, and expositions of Christianity, with almost the formality of lectures from the pulpit."[35] The editor of the *New York Herald,* who for a week had been giving the case front page coverage, dismissed the Webster presentation as patently narrow, "almost approaching a mere lawyer's," and contrary to common sense.[36] Recalling in later years his impression of the scene, John Wentworth, a congressman from Illinois, remarked that it was "the only three day's meeting that I ever attended where one man did all the preaching, and there was neither praying nor singing."[37]

Charles Warren, a twentieth-century constitutional historian, claimed that "few cases ever more keenly interested the general public or brought it more closely in contact with the court."[38] This was probably true, but it was due more to the fame of the counsel than because of the points of law at stake. The subtle complexities of charity law, confusing even to the initiated, were

completely lost on the layman. The *New York Herald* reporter's initial reaction was that there was "little or nothing of popular interest about the case." A detailed report, he told his readers, would be "as dry as a chip."[39] Yet only a few days later the courtroom was overflowing with spectators who came to witness the debate. "Daniel Webster is speaking," reported the excited *Herald* correspondent. "There is a tremendous squeeze — you can scarcely get a case knife in edgeways. . . ."[40] The proceedings took on the air of a public spectacle as Washington society turned out to hear Webster bring his address to a close. Even the press was a bit shocked at the "mixture of men and women, law and politeness, ogling and flirtation, bowing and curtsying, going on in the highest tribunal in America."[41]

In the final analysis, Horace Binney's carefully reasoned and documented brief outweighed Webster's inept if popular performance. Ironically, Justice Story, who had concurred with Marshall in the Hart decision, delivered the Court's unanimous opinion upholding Girard's will. After surveying Binney's presentation of the evidence, Story said that he was satisfied "that there is nothing in the devise establishing the college, or in the regulations contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the state of Pennsylvania."[42] Even more important, Story admitted that his and Marshall's earlier examination of charity law "and all the lights (certainly in no small degree shadowy, obscure, and flickering)," had been wholly inadequate.[43] For Associate Justice Henry Baldwin, sitting with Story on the bench, that was a handsome victory. For American philanthropy, it was a pledge of support from the highest court in the land.

CHAPTER 5

Philanthropy, Society, and the Law

TRADITIONAL EXPLANATIONS OF THE EVOLUTION OF AMERICAN charity laws have emphasized the force of precedent and legal logic. In *The American Law of Charities* Carl Zollmann argued that the restrictive interlude beginning with the Hart ruling in 1819 was simply the result of inadequate knowledge of English legal history. Like many of their contemporaries, Marshall and Story assumed that equity jurisdiction in charity cases originated in, and depended on, the Elizabethan Statute of Charitable Uses. Because Virginia had repealed that statute in 1792, as part of a general reaction against all things British, the Supreme Court had no authority to enforce Hart's charitable bequest. This decision, backed by the reputations of Marshall and Story, had great influence in the lower courts. Later, when legal researches in England and America proved that Chancery exercised jurisdiction over charitable uses long before the passage of the Statute, the Court accordingly reversed itself, and through its ruling in the Girard Will case returned to the main stream of Anglo-American charity law.[1]

Such an account, correct as far as it went, was too simple and too systematic. It ignored the fact that the life of the law was not

logic, but complex social experience. Legal tradition, a vast accumulation of custom and precedent, formed the foundation of the law, but changing circumstances and contemporary attitudes toward the proper balance between private rights and public responsibilities shaped the superstructure. American equity, as Joseph Story remarked in 1821, relied more upon discretion than syllogism. "Much is left to the habits of thinking of the particular judge," he wrote, "and more to that undefined notion of right and wrong, of hardship and inconvenience, which popular opinions alternately create, and justify."[2]

Despite the fact that its coming of age in the 1820's and '30's coincided with the rise of popular democracy, American charity law matured with little if any reference to the political and economic differences that divided Jacksonians and Federalists. James Kent, Joseph Story, and John Marshall, Federalists all, shared similar views on many subjects. They opposed the "false theories" and "dangerous doctrines" that accompanied the rise of the common man.[3] In respect to equity enforcement of charitable trusts, however, Kent criticised the principles of the Hart ruling in his influential *Commentaries on American Law* (1826-1830) and helped to publicize early attacks on that decision. A similar division existed among the Jacksonians. Though they were both Democrats, Henry Baldwin, a Jackson appointee to the Supreme Court, and Henry Saint-George Tucker, Jackson's first choice for Attorney General, were poles apart in their attitudes toward charitable trusts.

Common law emphasis on individual rights and private property made these concepts extremely attractive pegs on which to hang legal reasoning; judges and legislators alike used them to justify their attitudes and policies toward philanthropy whenever possible. Because some thought that charities were beneficial, while others were convinced that they were dangerous, lawmakers often arrived at opposite conclusions from identical premises respecting personal and property rights.

Those who argued for a permissive doctrine presented a strong case. More than a century of colonial experience, the social teachings of the churches, the emergence of urban poverty as a pressing social problem, and the English legal heritage all justified a liberal

public policy. Contemporary practice also argued for permissiveness. In the 1820's and 1830's philanthropic activity covered a wide range. Mathew Carey's periodic reports on giving, the *Annals of Liberality,* revealed the extent and diversity of American generosity. Joseph Tuckerman's ministry to the poor in Boston attracted benefactors and stimulated imitators in other cities. As in subsequent periods, innumerable religious and educational charities became the pet projects of society women. It was a busy time, noted James Paulding in 1816, for "those venerable married ladies, and thrice venerable spinsters, who go about our cities like roaring lions, doing good."[4] By 1833, Samuel Gridley Howe reported optimistically in the *North American Review* that "every infirmity, every misfortune, every vice even, has a phalanx of philanthropists to oppose its effects."[5]

Judges like Henry Baldwin and James Kent argued for a pragmatic, permissive legal doctrine which took account of past experience and contemporary practice. "Laws and acts which tend to public utility," wrote Baldwin, "should receive the most liberal and benign interpretation to effect the object intended or declared. . . ."[6] To those who maintained that the law had always been suspicious of perpetuities, and that a charitable trust was indeed perpetual, these judges replied that the public received sufficient benefit from philanthropic bequests to warrant a liberal interpretation of the perpetuity rule. Moreover, they emphasized the legal right of testators to control their property beyond the grave. They argued that the power to make charitable bequests, with the expectation that they would be faithfully executed, was within an individual's property rights and that the courts should protect those rights. Even John Marshall, in the Dartmouth College Case, had asserted that one of the foundations of philanthropy was the hope that charity would "flow forever in the channel which the givers have marked out for it."[7]

In spite of all the social and legal arguments for a permissive doctrine, in the years between 1819 and 1844 serious barriers obstructed philanthropy. What accounted for the restrictive drift? Clearly, the principal factor was that an influential group of judges and legislators, impressed by English experience with ecclesiastical

charities, concluded that the "dead hand" of self-perpetuating charitable associations was about to close on the wealth of American society. Joseph Story believed that charities trampled individual rights by depriving heirs of property to which they were entitled.[8] To Henry Saint-George Tucker, James Madison, Thomas Jefferson, and other secular-minded and progressive Virginians, charities symbolized advancing clerical power in society, threatening "usurpations on the rights of future generations."[9]

Story first elaborated his argument against unrestricted giving in the explanatory "Notes" to volume four of Henry Wheaton's *United States Supreme Court Reports,* the volume in which the Hart case appeared.[10] Writing anonymously, Story must have felt more free to editorialize than he did in the Hart opinion itself. After a long and detailed analysis of English charity law, Story discussed the English mortmain act of 1736. Praising its principles, he concluded with a pointed suggestion to American legislators. "It deserves the consideration of every wise and enlightened American legislator," he observed, "whether provisions similar to those of this celebrated statute are not proper to be enacted in this country." Legislative controls were needed, Story continued, in order "to prevent undue influence and imposition upon pious and feeble minds in their last moments, and to check that unhappy propensity which sometimes is found to exist under a bigoted enthusiasm, and the desire to gain fame as a religious devotee and benefactor, at the expense of all the natural claims of blood and parental duty to children."[11]

In July, 1820, Story was still apprehensive, still convinced of the "immediate and pressing" threat of mortmain. In a review of William Johnson's *New York Chancery Cases,* he suddenly introduced what appeared to be an irrelevant discussion of charity law. As in the "Notes" to Wheaton's *Reports,* Story proposed the adoption of mortmain statutes similar to those of England. He complained that in America there was not a single legislative, executive, or judicial safeguard against improper donations "procured by fanatical or other delusions," nor was there any check upon the administration of charitable bequests. "Already charitable donations, to an immense extent, have been bestowed in our country. . . . We are in

some danger . . . of having our most valuable estates locked up in mortmain, and our surplus wealth pass away in specious or mistaken charities, founded upon visionary or useless schemes, to the impoverishment of friends, and the injury of the poor and deserving of our own countrymen."[12]

Story seemed to believe that most charitable bequests were destructive of individual and property rights. His repeated allusions to "all the natural claims of blood" and "the impoverishment of friends" suggested that such considerations, rather than the possible social value of a philanthropic donation, was uppermost in his mind. Yet Story was not completely opposed to philanthropy. A close friend of Joseph Tuckerman, Story respected Tuckerman's ministry to Boston's poor. Moreover, he believed that his policy of strict surveillance of charitable bequests would ultimately assist "pious and benevolent men . . . and those who cultivate literature, the arts, or the sciences."[13] Nor did Story, a Unitarian, single out religious charities for attack. Although he criticized the acquisitive tendencies of the English monasteries and warned Americans against them, he did not conclude that the problem was peculiar to religious organizations.

Unlike Story, Henry Saint-George Tucker of Virginia had an ecclesiastical axe to grind. For more than a century the ideas of the Enlightenment had permeated Virginia culture, and it was this intellectual tradition that shaped Tucker's view of the proper relationship between religion and the secular government. In 1836 he told his students at the Winchester Law School that the clergy, not content with "availing themselves of superstitious weakness and imbecile piety to get what they could from humble penitents while they lived," hovered around the deathbed "like vultures and vampires, to defraud the unhappy heir. . . ."[14]

Like Jefferson, Madison, and other influential Virginians, Tucker believed that religion was a personal spiritual matter, beyond state control. His preference for the neutrality of the state in religious affairs, however, was modified by his fear that the church through its property holdings might enchance its political power. "Wealth is power," wrote Tucker, and in Virginia the primary basis of wealth was land. Little wonder that the state's legislators

and judges refused to assist religious bodies in securing and managing their temporal holdings.[15] "There may be less danger that Religion, if left to itself, will suffer from a failure of pecuniary support," wrote James Madison in 1832, "than that an omission of the public authorities to limit the duration of their Charters to Religious Corporations, and the amount of property acquirable by them, may lead to an injurious accumulation of wealth from the lavish donations and bequests prompted by a pious zeal or by an atoning remorse."[16]

There was a double motive for limiting the ability of charities to hold and manage property. The first, dread of clerical domination, was augmented by another idea of the Enlightenment, the proposition that the earth belongs to the living. By establishing a perpetual charitable trust, a donor imposed his will upon future generations. Jefferson believed that the idea that institutions once established could not be altered, even to accommodate them to changing conditions, was absurd. "Yet our lawyers and priests generally inculcate this doctrine," Jefferson complained, "and suppose that preceeding generations held the earth more freely than we do . . . in fine, that the earth belongs to the dead and not the living."[17]

Tucker incorporated these attitudes into his opinion in *Selden v. the Overseers of the Poor in Loudoun,* an unreported lower court decision of 1830 which laid the groundwork for his opinion in the Gallego case three years later. The Selden case, Tucker explained in 1836, contained "the best views I am able to give in reference to ecclesiastical concerns in this Commonwealth."[18] In his opinion Tucker upheld the Virginia disestablishment act of 1802 and argued that history demonstrated the dangers of ecclesiastical establishments and their "proneness . . . to vast accumulations of property." The Catholic Church, said Tucker, was the worst but by no means the only offender. "The evil is not sprung from the particular creeds, or the peculiarities of confessions of faith; it grows out of the very nature of the thing."[19] Tucker was convinced that any concession — such as giving religious bodies the right to hold and manage property for their own use or in trust for others — would only be the entering wedge. It was true, he wrote, that the actual

amount of property held by churches in Virginia was relatively insignificant. But, he added, "we read the history of ages past to little purpose if that consideration can lull our apprehensions, or put our just jealousy to sleep. . . . In the language of Archimedes, give them but a point to stand upon, and they can move the whole earth."[20]

In the Gallego case Tucker expanded the argument of the Selden ruling. "The possibility of religious interference in government," he asserted had made the Virginia legislature hostile to religious corporations. Realizing that wealth was power, the legislators had reasoned that severely limiting the amount of property a religious association could hold was a convenient and efficient means of preventing religious interference in secular affairs. Though Tucker followed his ruling in the Selden case so closely that he copied whole passages of the opinion verbatim, he also introduced a new element by suggesting that all charities, incorporated and unincorporated, religious and secular, were suspect. Religious charities led to clerical domination, but all charities withdrew from general circulation wealth that should be re-allocated in every generation. "These charities never die," he complained. Instead, they advanced upon society "with a step that never retrogrades."[21]

A wave of popular resentment against the special privileges granted by the states to banking corporations sharpened hostility toward religious and charitable societies that sought corporation charters. "Under the doctrines contended for in the case of banking institutions," protested John Taylor of Caroline, the power to create corporations could be used to invest a sect or society with a right to acquire wealth and protect that wealth from taxation. This possibility, Taylor argued, "begat enormous oppression."[22]

Many of the delegates to the Virginia constitutional convention of 1829-1830 shared Taylor's attitudes. Whenever the rights of religious and charitable societies came under consideration the discussion soon passed into a heated denunciation of corporate privilege. One delegate, concerned over the way in which the principles of religious liberty were being used to restrict philanthropy, introduced an amendment specifically allowing the legislature to incorporate religious societies and other groups "created for

charitable purposes, or the advancement of piety and learning."[23] Even though the proposal included a clause permitting the legislature to revoke such a charter at any time (which it could not do under the previous state constitution), this suggested reservation of power was not enough to offset the delegates' "great abhorrence" of all corporations. They were "bodies very irresponsible," asserted Governor William Giles, and through chartered privileges were usurping the powers of the legislature. Giles added that the state should hesitate to create any type of corporation. Furthermore, the "injurious effect of the incorporating power" was compounded in the case of religious societies. Such organizations "had already accomplished much mischief, . . . and threatened much more." Apparently Giles voiced the sentiments of most of the delegates, for they voted down the amendment by a margin of nearly nine to one.[24]

The anti-ecclesiastical spirit of the Enlightenment, fear of the dead hand, and fear of corporations accounted for Virginia's restrictive policy. Concerned less with the property rights of heirs than with threats to social welfare, Virginia lawmakers moved easily from the Selden decision to the broadly restrictive "Virginia Doctrine" which throttled many worthwhile philanthropies well into the twentieth century.[25]

Virginia's charity policy evolved naturally from the state's historic experience. Pennsylvania's brief flirtation with a restrictive doctrine, on the other hand, was a sudden aberration that ran counter to the state's traditional policy of encouraging private philanthropy.

In 1791 Pennsylvania had enacted a statute permitting the Attorney General to grant charters to the state's many religious, literary, and charitable societies. An economy measure, the act aimed at freeing the legislature from the burden of innumerable private incorporation petitions.[26] Nevertheless, in the following decades charitable and religious groups continued to apply to the legislature, and the lawmakers consistently honored their requests. The applications of 1830-1831 were fairly typical: there were petitions from religious congregations, beneficial societies, library companies, and one from the Society of Friends who wanted to incorporate a group for the purpose of "promoting the education of Quaker youths in useful learning."[27] But the legislators

balked. Casting about for an excuse, the Committee on Corporations recalled the 1791 statute. Invoking that act, the Committee declared that since another method existed for incorporating religious, literary and charitable societies, the legislature should not "be harrassed by these applications." The Committee's plea for economy and administrative efficiency was certainly justified, but this was only part of the story. One of the religious congregations had requested that the existing £500 limit on the total annual income of a religious or charitable corporation (imposed by the act of 1791) be raised to $5,000. To this the Committee replied that not only was it inadvisable to raise the ceiling on annual income, but that the very suggestion was "an additional motive for refusing a charter."[28] "A former legislature has fixed the sum of five hundred pounds annual income, as the utmost extent to which religious corporations could be permitted to draw away the property of your citizens from the general purposes of society," wrote the chairman curtly, "and the unanimous opinion of your committee is, that the limitation should not be enlarged."[29]

The legislature certainly understood the significance of its action. Two days later Representative James M'Sherry sponsored a motion inquiring whether "any further provision be required by law to secure the property held in trust for religious, charitable or literary purposes." M'Sherry, however, represented a minority. "After maturely considering the subject," the judiciary committee concluded that additional safeguards were unnecessary.[30]

The legislative action had far-reaching effects. In 1832 the legislators once again refused to incorporate several religious and charitable societies, citing the reasons given the previous year.[31] Moreover, the legislators' attitudes influenced the state's courts. The courts correctly interpreted the legislative action as being hostile to charitable and religious societies in general. Following this "policy of the legislature," the state supreme court in *The Methodist Church v. Remington* (1832) handed down one of the few decisions in Pennsylvania history in which legal technicalities were allowed to defeat a charitable devise.[32]

In Pennsylvania, however, the restrictive policy was short-lived. Such a policy was so foreign to Quaker State tradition and practice that it could not long survive. Unlike Virginia, Pennsylvania was historically committed to a liberal approach that granted considerable freedom to those who believed that philanthropy was a social or a religious duty. This explains why Henry Baldwin set out in 1833 in *Magill v. Brown* to correct what he considered to be an aberration, a legislative and judicial quirk. Convinced that in respect to philanthropy there was "a law of higher obligation which must guide our judgment," Baldwin argued persuasively that there was little danger of ecclesiastical domination in America, and that American society would suffer far more from a restrictive charity doctrine than from the blighting influence of the dead hand.

What were the consequences of the return to a permissive law of charity? What part did charity law play in American life? Its influence extended far beyond the court room, for any public policy which affected the alienation of property had far-reaching consequences. By controlling not only the ways in which property could be transferred, but also to whom and for what purposes, the law of charity affected the direction and character of the whole society.

Americans generally accepted the view that unreasonable restrictions upon the alienation of property were contrary to public policy. The problem lay in determining just what restrictions were unreasonable. There was relatively little disagreement that the laws of entail and primogeniture were undesirable in America, and by 1800 equalitarian demands for a more equitable distribution of land had virtually eliminated these vestiges of feudal society. The law of charitable trusts, however, posed a different and more difficult problem. Religious teachings, humanitarianism, and social needs argued in favor of charity. Fear of the consequences of permitting property to pass from general circulation into the hands of perpetual charitable associations argued against it. Time was required to resolve these clashing values and to arrive at a solution that encouraged philanthropy without injuring society.

The experimental situation in which Americans found themselves after 1776 was important in explaining the legal chaos. Having declared their political independence, Americans faced the possibility of a complete break with the English past, a partial break, or an all-out continuation of English policies. In this new and

perplexing situation the judges, as Joseph Story remarked, often had little to guide them except their own ideas of what was desirable. Moreover, the absence of any clear-cut federal policy encouraged the evolution of many conflicting state policies, each conditioned by local experiences and attitudes, attitudes which in origin often had nothing to do with philanthropy itself.

By 1844 two traditions had evolved from the uncertain precedents and unsettled doctrines of the early national period, and both continued to have considerable influence beyond that date. The dominant tradition, the permissive policy of Pennsylvania as represented in *Magill v. Brown* and the Girard Will case, shaped subsequent charity doctrines throughout most of the United States. Although only a few states formally embraced Virginia's restrictive policy, its influence was nonetheless important. The Virginia Doctrine added a note of suspicion, a suggestion that charitable trusts could not be trusted. However well-disposed a donor might be, however carefully he drew his will, the law ultimately determined the acceptability of his plans. To succeed, philanthropy needed the positive assistance of the law.

Notes to the Text

PREFACE

[1] See Austin W. Scott's definitive study, *The Law of Trusts* (2 ed., 5 vols., Boston, 1956), which provides the basis for this discussion.

[2] For a clear historical analysis of mortmain, see H. D. Hazeltine, "Mortmain," *Encyclopaedia of the Social Sciences* (15 vols., New York, 1930-1935), 11:40-50.

[3] Wilbur K. Jordan, *Philanthropy in England, 1480-1660* (New York, 1959), 109-117, discusses the evolution of private trusts.

[4] Scott, *Law of Trusts,* 1:5, 4:2250-2917.

[5] *Statutes of the Realm* (9 vols., London, 1810-1822), 4: Part 2, 968-970.

1. A TRADITION IN TRANSIT

[1] John Winthrop, *A Modell of Christian Charity,* reprinted in *Old South Leaflets,* No. 207 (Boston, n.d.), 19-20.

[2] Winthrop, *Modell of Christian Charity,* 7-8; John M. Tomsich, Public Welfare and Private Philanthropy in Puritan Massachusetts, 1630 to 1686 (Typescript Master's Thesis, University of Wisconsin, 1959), 58-61.

[3] Jordan, *Philanthropy in England,* 15 and *passim.* Jordan characterizes his work as a study "concerned with men's aspirations for their own age and for generations yet to come; with their heroic effort to shape the course of history by creating enduring social institutions which would contribute significantly, often decisively, in determining the structure and nature of the society just then coming into being."

[4] Tomsich, Private Philanthropy in Puritan Massachusetts, 76; Marcus W. Jernegan, *Laboring and Dependent Classes in Colonial America, 1607-1783* (Chicago, 1931), 189-209.

[5] Tomsich, Private Philanthropy in Puritan Massachusetts, 71-76.

[6] For a general survey of Boston philanthropy, see Carl Bridenbaugh, *Cities in the Wilderness* (New York, 1955), 81-82, 235.

[7] Robert Kelso, *The History of Public Poor Relief in Massachusetts, 1620-1920* (Boston, 1922), 121-124; Jernegan, *Laboring and Dependent Classes*, 197; Bridenbaugh, *Cities in the Wilderness*, 78-79.

[8] Bridenbaugh, *Cities in the Wilderness*, 235-236, 394-95.

[9] *Statutes at Large of Pennsylvania*, Chap. 178. James T. Mitchell, Henry Flanders, *et al*, comps., *Statutes at Large of Pennsylvania from 1682 to 1801* (18 vols., n.p., 1896-1915), 2: 424-425. See also Guy Le R. Stevick, *Unincorporated Associations, Their Legal Status in Pennsylvania, and Some of the Rights and Obligations Incident Thereto* (Philadelphia, 1887), 3-4.

[10] Mitchell and Flanders, *Statutes at Large of Pennsylvania*, 2:544.

[11] Mitchell and Flanders, *Statutes at Large of Pennsylvania*, 3:37-38, Appendix X, 448.

[12] Mitchell and Flanders, *Statutes at Large of Pennsylvania*, 3:439-440, 463-464.

[13] *Statutes at Large of Pennsylvania*, Chap. 320. Mitchell and Flanders, *Statutes at Large of Pennsylvania*, 4:208-209.

[14] *Statutes at Large of Pennsylvania*, Chap. 376. Mitchell and Flanders, *Statutes at Large of Pennsylvania*, 5:79-86; William C. Heffner, *The History of Poor Relief Legislation in Pennsylvania, 1682-1913* (Cleona, Pa., 1913), 73-74, 123.

[15] Heffner, *Poor Relief Legislation in Pennsylvania*, 74-75.

[16] For a useful survey of Virginia's relief system, see Jernegan, *Laboring and Dependent Classes*, 175-188.

[17] "Isle of Wight County Records," *William and Mary Quarterly*, 7:222 (April, 1899); Philip A. Bruce, *Institutional History of Virginia in the 17th Century* (2 vols., New York, 1910), 1:26-27; Jernegan, *Laboring and Dependent Classes*, 181-182.

[18] Robert Beverley, *The History and Present State of Virginia* (1705), edited by Louis B. Wright (Chapel Hill, 1947), 276.

[19] *A Case*, 2 Virginia Colonial Decisions, Barradall's Reports 363-366. The extant records from this case and most other colonial Virginia cases are fragmentary.

[20] As quoted in Thomas Jefferson, *The Papers of Thomas Jefferson*, edited by Julian P. Boyd (15 vols. to date, Princeton, 1950-1958), 1:600-661.

2. NEW LAW FOR THE NEW NATION

[1] A convenient summary of colonial American jurisprudence is Richard B. Morris, *Studies in the History of American Law, With Special Reference to the Seventeenth and Eighteenth Centuries* (New York, 1930), 17-68. See also George L. Haskins' perceptive essay, "Law and Colonial Society," *American Quarterly*, 9:354-364 (Fall, 1957).

[2] William Slade, comp., *The Laws of Vermont, of a Public and Permanent Nature, Coming Down to, and Including, the Year 1824* (Windsor, 1826), 57.

[3] Richard N. Thorpe, comp., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (7 vols., Washington, 1909), 3:1910.

[4] Thorpe, *Federal and State Constitutions*, 5:2598; 4:2469; 6:3247; 5:2635-2636; 1:566-567; William W. Hening, comp., *The Statutes at Large; Being a Collection of All the Laws of Virginia* (13 vols., Philadelphia and Richmond, 1809-1823), 9:127.

[5] Samuel Jones and Richard Varick, comps., *Laws of the State of New York, Comprising the Constitution, and the Acts of the Legislature Since the Revolution, from the First to the Twelfth Session, Inclusive* (2 vols., New York, 1789), 1:281.

[6] Carl Zollmann, *American Law of Charities* (Milwaukee, 1924), 25.

[7] The report appeared in the *Journal of the Senate of the Commonwealth of Pennsylvania*, 19:54-78.

[8] *A Collection of all Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as are now in Force* (Richmond, 1794), 302.

[9] *Poor v. Green*, 5 Binney 554.

[10] Philip Freneau, *The Poems of Philip Freneau*, edited by F. L. Pattee (3 vols., Princeton, 1902), 2:304.

[11] *The Works of William E. Channing, D.D.* (6 vols, 12th complete ed., Boston, 1853), 1:254-255, 261.

[12] Roscoe Pound, *The Formative Era of American Law* (New York, 1950), 7; Charles Warren, *History of the American Bar* (Boston, 1911), 3-18; Merle Curti, *The Growth of American Thought* (2 ed., New York, 1951), 237.

[13] *Talbot qui tam, etc., v. The Commanders and Owners of Three Brigs*, 1 Dallas 106, 1 Lawyer's Edition 106.

[14] James Sullivan, *History of Land Titles in Massachusetts* (Boston, 1801), v. See also Willard Philips, "Review of Kent's Commentaries," *North American Review*, 1:165-167 (March, 1827); 1 *Root's Connecticut Reports*, (Hartford, 1798), iii-xiii.

[15] *Journal of the Twentieth House of Representatives of the Commonwealth of Pennsylvania* (Lancaster, 1809-1810), 856; Sullivan, *Land Titles in Massachusetts*, 337.

[16] Lyon G. Tyler, *The Letters and Times of the Tylers* (2 vols., Richmond, 1884), 1:261.

[17] William Sampson, *Discourse on the Common Law* (New York, 1824), 21, 57.

[18] Caleb Cushing, "Review of Stearns' and Shaw's Revised General Laws of Massachusetts," *North American Review*, 17:72 (July, 1823). See also 1 *Johnson's New York Chancery Reports* (1806) (2 ed., Albany, n.d.), iv; Bird Wilson, comp., *The Works of the Honourable James Wilson*, LL.D. (3 vols., Philadelphia, 1804), 1:17, 26-27.

[19] Thomas Jefferson to Samuel Kercheval, June 12, 1816, in Thomas Jefferson, *The Writings of Thomas Jefferson*, edited by Paul L. Ford (12 vols., New York, 1892-1899), 12:11-13; Arthur A. Ekirch, Jr., *The Idea of Progress in America, 1815-1860* (New York, 1944), 252; Paul Reinsch, *The English Common Law in the Early American Colonies* (Madison, 1899), 5.

[20] Thomas Jefferson to Samuel Kercheval, June 12, 1816, in Jefferson, *Writings* (Ford ed.), 12:11-13.

[21] James Russell Lowell, "A Glance Behind the Curtain" (1843), in *The Complete Poetical Works of James Russell Lowell*, edited by Horace Scudder (Boston, 1917), 53.

[22] Nathaniel Chipman, *A Dissertation on the Act Adopting the Common and Statute Laws of England* (2 ed., St. Paul, 1888), 121-122. See also Sampson, *Discourse on the Common Law*, 15.

[23] *Journal of the House of Delegates of the Commonwealth of Virginia, 1818* (Richmond, 1818), 12.

[24] *Annals of Congress* (14 Cong., 2 Sess., House of Representatives), 30:336-337; *Washington Daily Intelligencer*, Dec. 27, 1816; *Niles Weekly Register*, 11:311-312 (January 4, 1817).

[25] *Annals of Congress*, 29:1202, 1222, 1458; 30:996, 1043.

[26] *North American Review*, 21:388 (October, 1825). See also the *American Quarterly Review*, 1:165 (March, 1827).

[27] For some impression of the number and variety of American editions of Blackstone's works see Catherine S. Heller, "The William Blackstone Collection in the Yale Law Library: A Bibliographical Catalogue," *Yale Law Library Publications No. 6* (New Haven, 1938), 37-71; *Library of Congress Catalog of Printed Cards* (Ann Arbor, 1943), 15:205-212.

[28] *Pennsylvania Law Journal* (Philadelphia, 1842), 1:220-221; *American Law Magazine* (Philadelphia, 1843-1844), 2: *passim; New York Legal Observer* (New York, 1843), 1: Appendix.

[29] "The United States (Literature)," *Encyclopaedia Americana* (13 vols., new ed., Philadelphia, 1839), 12:460.

[30] Alexis de Toqueville, *Democracy in America,* translated by Henry Reeve (2 ed., New York, 1838), 27. See also Michael Chevalier, *Society, Manners and Politics in the United States* (Boston, 1839), 359.

[31] James Kent to Thomas Washington, October 6, 1828, as quoted in *The Green Bag* (Boston, 1897), 9:206-211.

[32] Joseph Story, "An Address Before the Suffolk Bar, at Boston, 4th September, 1821," Joseph Story, *Miscellaneous Writings, Literary, Critical, Juridical, and Political* (Boston, 1835), 416.

[33] 1 *Nott & M'Cord's South Carolina Reports* (Charleston, 1842), iii.

[34] James Kent, *An Address Delivered Before the Law Association of New York, October 21st, 1836* (New York, 1836), 17.

[35] Entry of September 16, 1776, Henry M. Muhlenberg, *The Journals of Henry Melchior Muhlenberg,* edited by Theodore G. Tappert and J. W. Doberstein (3 vols., Philadelphia, 1942-1958), 2:740-742. Compare the version in "Notes and Queries," *Pennsylvania Magazine of History and Biography,* 22:129 (1898).

[36] Muhlenberg, *Journal,* 2:740-742. For Smith's stormy career see Harris E. Starr, "William Smith," *Dictionary of American Biography* (22 vols., New York, 1928-1958), 17:353-357.

[37] Muhlenberg, *Journal,* 2:741. For a conservative view of the constitutional convention, see Burton Konkle, *The Life and Times of Thomas Smith, 1745-1809* (Philadelphia, 1904), 75.

[38] Muhlenberg, *Journal,* 2:742. The convention received and tabled the petition on September 25, 1776. *Minutes of the Proceedings of the Convention of the State of Pennsylvania, held at Philadelphia the 15th day of July, 1776, and Continued by Adjournments to the 28th September Following,* in Samuel Hazard *et al,* eds., *Pennsylvania Archives* (138 vols., Philadelphia, 1852-1949), Ser. 3, 10:766.

[39] Thorpe, *Federal and State Constitutions,* 5:3091.

[40] Thorpe, *Federal and State Constitutions,* 5:3099.

[41] Mitchell & Flanders, *Statutes at Large of Pennsylvania,* 14:50.

[42] *Journal of the Senate of the Commonwealth of Pennsylvania* (Lancaster, 1808), 19:77; John Reed, *Pennsylvania Blackstone; Being a Modification of Sir William Blackstone's Commentaries, with Numerous Alterations and Additions, Designed to Present an Elementary Exposition of the Entire Laws of Pennsylvania* (3 vols., Carlisle, Pa., 1831), 2:40.

[43] Thorpe, *Federal and State Constitutions,* 6:3748.

[44] Thorpe, *Federal and State Constitutions,* 3:1906-1907.

[45] Thorpe, *Federal and State Constitutions,* 4:2467-2468. New Hampshire's first constitution (1776) had been silent in regard to philanthropy.

[46] Zollmann, *American Law of Charities,* 48-49.

[47] Zollmann, *American Law of Charities,* 47. In 1845 the Connecticut Supreme Court declared that the execution of charitable trusts was "in accordance with the enlightened and philanthropic spirit of the age." *American Bible Society et al v. Wetmore et al,* 17 Connecticut 189.

[48] Thomas Greenleaf, comp., *Laws of the State of New-York* (2 ed., 3 vols., New York, 1798), 1:71.

[49] Greenleaf, *Laws of New-York,* 1:72.

[50] B. F. Butler and J. C. Spencer, comps., *The Revised Statutes of the State of New York, as Altered by the Legislature* (2 ed., 3 vols., Albany, 1836), 3:627. See also Zollmann, *American Law of Charities,* 345-346.

[51] Butler and Spencer, *Revised Statutes of New York,* 2:57.

[52] James Kent, *Commentaries on American Law* (4 vols., New York, 1826-1830), 2:227, 4:306-307.

[53] *Journal of the Forty-First House of Representatives of the Commonwealth of Pennsylvania* (Harrisburg, 1831), 1:435-436, 442, 534; *Journal of the Forty-Second House of Representatives of the Commonwealth of Pennsylvania* (Harrisburg, 1832), 2:698, 778.

[54] Hening, *The Statutes at Large of Virginia,* 9:164-167. For Jefferson's draft of the bill see Thomas Jefferson, *The Papers of Thomas Jefferson,* edited by Julian P. Boyd (15 vols. to date, Princeton, 1950-1958), 1:532-533.

[55] *Laws of Virginia, 1801,* Chap. V.

[56] Acts of 1805-1806, Chap. 74, in *Code of Virginia* (1849), Chap. 77, Sec. VIII, 362.

[57] *Gallego's Executors v. the Attorney General,* 3 Leigh 477. For impressions of the general attitude of the Virginia legislature in the 1820's toward religious corporations, see the remarks of Justice Robert Stanard in *Selden et al v. the Overseers of the Poor of Loudoun,* 11 Leigh 133-134 (1840).

[58] *Proceedings and Debates of the Virginia State Convention of 1829-1830* (Richmond, 1830), 459-460, 708-709.

3. THE SUPREME COURT AND THE VIRGINIA DOCTRINE

[1] Joseph Story to Henry Wheaton, December 9, 1818, in William W. Story, *The Life and Letters of Joseph Story* (2 vols., Boston, 1851), 1:313.

[2] 4 Wheaton 1, 4 Lawyer's Edition 499.

[3] For the reaction of Virginia Baptists to the suit, see Robert B. Semple, *A History of the Rise and Progress of the Baptists in Virginia* (Richmond, 1810), 192-193.

[4] 4 Wheaton 6-7, 4 Lawyer's Edition 500-501.

[5] *A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as are Now in Force,* 302.

[6] 4 Wheaton 7, 4 Lawyer's Edition 501.

[7] 4 Wheaton 28, 4 Lawyer's Edition 506.

[8] Joseph Story in *Inglis v. The Trustees of the Sailors Snug Harbor,* 3 Peters 149, 7 Lawyer's Edition 635. Story published his concurrence in the Hart case as an Appendix to 3 Peters Reports.

[9] Timothy Farrar, *Report of the Case of the Trustees of Dartmouth College against William Woodward* (Portsmouth, N.H., 1819), 243.

[10] 4 Wheaton 38, 4 Lawyer's Edition 506. See also Irvin G. Wyllie, "The Search for An American Law of Charity, 1776-1844," *Mississippi Valley Historical Review,* 46:208-210. (September, 1959).

[11] 9 Cranch 43, 48-49, 3 Lawyer's Edition 651, 653.

[12] 4 Wheaton 647, 4 Lawyer's Edition 661.

[13] 4 Wheaton 647, 4 Lawyer's Edition 661-662; Farrar, *The Dartmouth College Case,* 283.

[14] *Green et al v. Dennis,* 6 Connecticut 292.

[15] 6 Connecticut 298, 301.

[16] 3 Leigh 450.

[17] 3 Leigh 462.

[18] 3 Leigh 462.

[19] 3 Leigh 480-481.

[20] 4 Leigh 327-330.

[21] Edward S. Hirschler, "A Survey of Charitable Trusts in Virginia," *Virginia Law Review,* 25:110 (1938).

[22] *Trippe v. Frazier, et ux. et al,* 4 Harris and Johnson 44.
[23] 5 Harris and Johnson 398.
[24] 5 Harris and Johnson 403. The Maryland courts reinforced a restrictive policy in *Murphy v. Dallam,* 1 Bland 529 (1829); *Kurtz et al v. Beatty,* 2 Cranch Circuit Court Reports 699 (1826); *Barnes's Heirs v. Barnes's Executors and the Corporation of Georgetown,* 3 Cranch Circuit Court Reports 269 (1827).
[25] *Charles et al v. Hunnicutt,* 5 Call 311, 328.
[26] 6 Munford 163.
[27] 6 Munford 163.
[28] 3 Leigh 480.
[29] *Hill's Executors v. Bowman & Wife et al,* 7 Leigh 650.
[30] *Code of Virginia* (1849), Chap. 80, Sec. 2.
[31] *Maryland Acts of 1842,* Chap. 86; *Journal of Proceedings of the House of Delegates of the State of Maryland, December Session, 1842* (Annapolis, 1842), 245, 316, 353.
[32] Some indication of the situation in Virginia as late as 1845 can be inferred from the following satire in A. Campbell, *The Millenial Harbinger; A Monthly Publication Devoted to Primitive Christianity,* Ser. 3, 2:424 (Bethany, Virginia, 1845). "Why cannot we simplify the language of the law? Why not banish its old black letter Vandalism? 'Sir, I give you this orange,' and I do give it. Should not that declaration and transfer be deemed an absolute conveyance? Yet to make it perfectly legal it must run thus:—'I give you all and singular my estate and interests, right, title, and claim, and advantage of and in that orange, with the rind, skin, juice, pulp, and pips, and all rights and advantages therein, with the full power to bite, cut, suck, or otherwise eat the same, or give the same away.'"
[33] Horace Binney to D. A. White, August 26, 1844, Charles C. Binney, *The Life of Horace Binney* (Philadelphia, 1903), 233.

4. AMERICAN ANSWERS TO AMERICAN QUESTIONS

[1] Kent, *Commentaries,* 2:231.
[2] Kent, *Commentaries,* 2:231-232.
[3] Wyllie, "The Search for an American Law of Charity," *Mississippi Valley Historical Review,* 46:217.
[4] 17 Sargeant and Rawle 88-90.
[5] 17 Sargeant and Rawle 91.
[6] 9 Cowen 473.
[7] 9 Cowen 488-489.
[8] For Baldwin's career, see *Dictionary of American Biography;* 1:533-534; *National Cyclopedia of American Biography* (41 vols., New York, 1892-1956), 2:257-258.
[9] Joseph Story to Mrs. Story, January 31, 1829, Story, *Life and Letters,* 2:35; Charles Warren, *The Supreme Court in United States History* (2 vols., Boston, 1935), 1:711-712.
[10] Henry Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States, Deduced from the Political History and Condition of the Colonies and States, from 1774 until 1788: And the Decisions of the Supreme Court of the United States* (Philadelphia, 1837). For Story's reaction, see his letter to Richard Peters, June 14, 1837, Story, *Life and Letters,* 2:273.
[11] *Magill v. Brown,* Federal Case No. 8952, 408-409.
[12] Federal Case No. 8952, 409.
[13] 1 Penrose and Watts 49; 1 Watts 225.
[14] Federal Case No. 8952, 412.

[15] Federal Case No. 8952, 420.
[16] Federal Case No. 8952, 414, 424, 446.
[17] Federal Case No. 8952, 419, 427.
[18] Robert B. Semple, *A History of the Rise and Progress of the Baptists in Virginia* (Richmond, 1810), 192-193.
[19] Federal Case No. 8952, 437-438.
[20] Federal Case No. 8952, 444, 446.
[21] Federal Case No. 8952, 448.
[22] Federal Case No. 8952, 448.
[23] Wyllie, "The Search for an American Law of Charity." *Mississippi Valley Historical Review,* 46:219.
[24] For the reaction of some of the intended recipients of Burr's liberality, see *The Gospel Messenger, and Southern Episcopal Register,* 5:282 (September, 1828); *The Home Missionary and American Pastor's Journal,* 1:33 (June, 1828), 1:68 (August, 1828).
[25] 7 Vermont 255, 279, 282, 305.
[26] *Potter v. Chapin et al,* 6 Paige 639.
[27] *King et al v. Woodhull et al,* 3 Edwards Chancery 88-89; *Burbank et al v. Whitney,* 41 Massachusetts 53.
[28] For Girard's busy career, see John Bach McMaster, *The Life and Times of Stephen Girard* (2 vols., Philadelphia, 1918).
[29] *Vidal v. Girard's Executors,* 43 U.S. (2 Howard) 127-136, 11 Lawyer's Edition 206-210.
[30] Binney, *Horace Binney,* 215-217.
[31] According to his son (Binney, *Horace Binney,* 231), Binney did not make a special trip to England in search of evidence, as claimed by Henry A. Wise, *Seven Decades of the Union* (Richmond, 1881), 219.
[32] Wyllie, "The Search for an American Law of Charity," *Mississippi Valley Historical Review,* 46:220.
[33] *New York Herald,* February 8, 1844. For other favorable comments see Wise, *Seven Decades of the Union,* 216, 220, and the remarks of Robert C. Winthrop in *Proceedings of the Massachusetts Historical Society,* 14:156 (Boston, 1876).
[34] 43 U.S. (2 Howard) 172, 11 Lawyer's Edition 224. From the outset the clergy had attacked Girard's exclusion clause. See the *Methodist Quarterly Review,* 23:170-175 (April, 1841), and the series of open letters in the *Pennsylvania Whig* during March, 1832.
[35] Story to James Kent, August 31, 1844; Story to Mrs. Story, February 10, 1844, Story, *Life and Letters,* 2:468-469.
[36] *New York Herald,* February 15, 1844.
[37] John Wentworth, *Congressional Reminiscences,* (Chicago, 1882), 36.
[38] Warren, *The Supreme Court in United States History,* 2:398.
[39] *New York Herald,* February 8, 1844.
[40] *New York Herald,* February 12, 1844. John Quincy Adams, with his usual acidity, noted in his diary that he had stopped by the Court "to see what had become of Stephen Girard's will, and the scramble of lawyers and collaterals for the fragments of his colossal and misshapen endowment of an infidel charity school for orphan boys." *Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848,* edited by Charles F. Adams (12 vols., Philadelphia, 1876), 11:518.
[41] *New York Herald,* February 8, 1844.
[42] 43 U.S. (2 Howard) 199, 11 Lawyer's Edition 235. See also Story to Mrs. Story, March 3, 1844, and Story to James Kent, August 31, 1844, Story, *Life and Letters* II, 473, 469.
[43] 43 U.S. (2 Howard) 192, 194, 11 Lawyer's Edition 232, 233.

5. PHILANTHROPY, SOCIETY, AND THE LAW

[1] Zollmann, *American Law of Charities,* 5-7. Zollmann is representative of the legal commentators on charity law; similar analyses can be found in Edith L. Fisch, "American Acceptance of Charitable Trusts," *Notre Dame Lawyer,* 28:225-227 (Winter, 1953); Scott, *Law of Trusts,* 4:2567; Robert L. Fowler, *The Law of Charitable Uses, Trusts, and Donations in New York* (New York, 1896), *passim.*

[2] Joseph Story, "Address Before the Suffolk Bar," Story, *Miscellaneous Writings,* 425.

[3] Joseph Story to Francis Lieber, August 15, 1837, Story, *Life and Letters,* 2:278-279.

[4] James K. Paulding, *Letters from the South, Written During an Excursion in the Summer of 1816* (2 vols., New York, 1817), 1:144.

[5] Samuel Gridley Howe, "Education for the Blind," *North American Review,* 37:21 (July, 1833).

[6] Baldwin, *A General View of the Constitution,* 8.

[7] 4 Wheaton 647, 4 Lawyer's Edition 661-662. On the application of common law doctrines of property rights to the enforcement of testator's wishes, see Edith L. Fisch, "Changing Concepts and *Cy Pres,*" *Cornell Law Quarterly,* 44:382 (Spring, 1959).

[8] General uncertainty of the future, heightened by what John Quincy Adams described as "a vague but wide-spread discontent, caused by the disordered circumstances of individuals . . . not concentrated in any particular direction, but ready to seize upon any event . . . ," probably led many conservatives to tighten their grip on private property. See Adams, *Diary,* 5:128, and Samuel Rezneck, "The Depression of 1819-1822: A Social History," in *American Historical Review,* 39:28-47 (October, 1933).

[9] James Madison to James Paulding, March 10, 1827, James Madison, *The Writings of James Madison,* edited by Galliard Hunt (9 vols., New York, 1908), 9:281-282.

[10] Story had often anonymously supplied notes and appendices as a personal favor to his overworked colleague Henry Wheaton. "I made it an express condition," wrote Story, "that the notes furnished by me should pass as his own. . . ." Story, *Life and Letters,* 1:282-283. Story again claimed authorship in his *Commentaries on Equity Jurisprudence, as Administered in England and America,* (2 vols., Boston, 1836), 2:389. Story's discussion of charities in the *Commentaries* (2:389-437) was almost a literal restatement of the essay in 4 Wheaton.

[11] 4 Wheaton 22, 4 Lawyer's Edition 686.

[12] Joseph Story, "Review of the Reports of Cases Adjudged in the Court of Chancery of New York, by William Johnson, Counsellor at Law, Vols. I, II, and III," *North American Review,* 11:146-147 (July, 1820).

[13] Story, "Review of Johnson's Chancery Cases," in *North American Review,* 147; Story to William E. Channing, April 10, 1841, Story, *Life and Letters,* 2:369-371.

[14] Henry Saint-George Tucker, *Commentaries on the Laws of Virginia, Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School,* (2 vols., Winchester, 1836), 1:32.

[15] For a partisan though generally reliable study of this aspect of Virginia Deism, see G. MacLaren Brydon, "The Antiecclesiastical Laws of Virginia," *Virginia Magazine of History and Biography,* 64:259-285; and Brydon's larger study, *Virginia's Mother Church, and the Political Conditions Under Which it Grew,* (2 vols., Philadelphia, 1952), 2:396-646.

[16] James Madison to Rev. Jasper Adams, 1832, Madison, *Writings* (Hunt ed.), 9:487. See also Madison's revealing comments in his "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," in Elizabeth Fleet, ed., "Madison's 'Detached Memoranda,'" in *William and Mary Quarterly,* 3rd. Series 3:556-558 (October, 1946).

[17] Thomas Jefferson to William Plummer, July 21, 1816, *The Writings of Thomas Jefferson,* edited by Andrew A. Lipscomb (20 vols., Washington, 1903-1905), 15:46-47.

[18] Tucker, *Commentaries,* 1:154n. The Seldon opinion appeared as an Appendix to Vol. 2 of the *Commentaries.*

[19] Tucker, *Commentaries,* 2:Appendix, 16-17.

[20] Tucker, *Commentaries,* 2:Appendix, 17. In 1840 the Seldon ruling was appealed to the Virginia Supreme Court of Appeals. Tucker, the President of the Court, excused himself because he had handed down the earlier ruling. Associate Justice Robert Stanard delivered the opinion which, though more temperate than Tucker's, nevertheless strengthened the earlier decision. *Seldon v. the Overseers of the Poor of Loudoun,* 11 Leigh 127.

[21] 3 Leigh 477-480.

[22] John Taylor, *Constitution Construed, and Constitutions Vindicated* (Richmond, 1820), 90.

[23] *Proceedings and Debates of the Virginia State Convention of 1829-30* (Richmond, 1830), 459.

[24] *Proceedings of the Virginia Convention,* 460, 708-709.

[25] For Virginia's subsequent public policy, see Hirschler, "A Survey of Charitable Trusts in Virginia," *Virginia Law Review,* 109-116.

[26] Mitchell and Flanders, *Statutes at Large of Pennsylvania,* 14:50-53.

[27] "Report of the Committee on Corporations Upon Sundry Petitions Praying for Acts of Incorporation, &c," *Journal of the Forty-First House of Representatives of the Commonwealth of Pennsylvania* (3 vols., Harrisburg, 1830-1831), 2:813-814.

[28] *Journal of the Forty-First Pennsylvania House of Representatives,* 2:814.

[29] *Journal of the Forty-First Pennsylvania House of Representatives,* 2:814.

[30] *Journal of the Forty-First Pennsylvania House of Representatives,* 1:442; 2:839.

[31] *Journal of the Forty-Second House of Representatives of the Commonwealth of Pennsylvania* (3 vols., Harrisburg, 1831-1832), 2:698, 778.

[32] 1 Watts 225.

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